No. 12,061

In the United States Court of Appeals

For the Ninth Circuit

TOMOYA KAWAKITA, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 12,061

Appeal from the District Court of the United States for the Southern District of California Central Division

Honorable William C. Mathes, Trial Judge.

Appellant's Reply Brief

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THE DUTY OF APPELLATE COURT IN TREASON CASE IS TO RE-EXAMINE ALL EVIDENCE AND REVERSE IF BASED UPON PERJURY, PASSION OR INADEQUATE EVIDENCE.

The appellees have largely based their reply on the fact that there was a verdict by a jury and, therefore, on appeal the court should follow the findings of the jury.

However, this overlooks both the practice and procedure followed by the Supreme Court of the United States in treason and due process cases.

Constitutional Requirement Must Be Met

(1) Where there is a treason case before it the Court will re-examine all of the evidence in the case to see if there has been a fulfillment not only of the *constitutional requirement* in a treason case but of the sufficiency of the evidence to sustain the conviction of the highest crime that is charged. . . . Thus, in the case of *Cramer v. United States,* 325 U. S. 1, Mr. Justice Jackson closely analyzed all of the facts. He pointed out in his learned opinion that the Framers of the Constitution were concerned "to guard the treason offense against . . . or (2) conviction of the innocent as the result of perjury, passion or inadequate evidence. . . . The second danger lay in the manner of trial and was one which would be diminished mainly by procedural requirements—mainly, but not wholly, for the hazards of trial also would be diminished by confining the treason offense to kinds of conduct susceptible of reasonably sure proof."

Re-Examination Must Be Made to Determine That Conviction Is Not the Result of "Perjury, Passion or Inadequate Evidence."

It is implicit in the opinion that the Supreme Court there stated that the evidence should be re-examined fully by the appellate court, and that court did re-examine all of the evidence to see that conviction was not the result of "perjury, passion or *inadequate evidence,*" and the court there found that the evidence

was *inadequate* and after *re-examining* all of the facts the court held that they were insufficient to sustain Cramer's conviction. The court said as follows:

> " 'Prosecutions for treason were generally virulent.' Time has not made the accusation of treachery less poisonous, nor the task of judging one charged with betraying the country, including his triers, less susceptible to the influence of suspicion and rancor. The innovations made by the forefathers in the law of treason were conceived in a faith such as Paine put in the maxim that 'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.' We still put trust in it." (89 L. Ed. 1468).

In *Haupt v. United States,* 300 U. S. 631, at page 635, the court again meticulously reviewed all of the evidence to determine if there was sufficient evidence to sustain a conviction against Haupt. The court again re-examined all of the evidence. The court, there, in commenting on *its* holding in the *Cramer case* which reversed the jury findings said:

> "It was reversed because the *Court found* that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not."

Showing that the Supreme Court also thought it was necessary to re-examine the evidence, it stated:

> "The most difficult issue in this case is whether the overt acts have been proved as the Constitution requires, and several grounds of attack on the conviction disappear if there has been compliance with the *constitutional standard of proof.*"

This is the second reason why the reviewing court must review the evidence in a treason case.

Re-Examination Required to Determine If There Has Been Due Process

A third reason presented by our case is the *requirement of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.* The Supreme Court has held that where due process is involved—that is, the issue of whether there has been a fair trial, the court will itself re-examine all of the evidence to determine not only whether there has been fair trial, but whether the quantum of evidence measures up to the standard required in order to show that no fair trial was accorded.

> *Lisenba v. California,* 314 U. S. 219, 86 L. Ed. 166.

And, the Supreme Court has always said that in the Federal Courts the court has supervisory power over the course and conduct of criminal trials generally in its courts.

The appellees resting their case upon the verdicts of the jury shows that they regard the *facts* as weak, inso-

far as it ever establishes any element of treason, or betrayal of the United States.

This being a death penalty case, and issues of due process of law being involved, the Supreme Court of the United States has said that in such a case it is its duty, independent of any verdict of the jury, to re-examine the facts and determine whether due process has been accorded. (*Chambers v. Florida,* 309 U. S. 227; *Lisenba v. California,* 314 U. S. 219, 86 L. Ed. 166; *Ashcraft v. Tennessee,* 322 U. S. 143; *Malmiski v. New York,* 324 U. S. 401, 404, 89 L. Ed. 1032).

"Circumstances equally consistent with either hypothesis prove neither, and the party having the burden must fail," (*Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333, 77 L. Ed. 819; *Mutual Life Insurance Company v. Hess,* 161 Fed. (2d) 1, 4). The federal rule therefore is to re-examine the entire record to see if as a matter of law the crime has been legally established. Where the constitution defines the crime it is mandatory upon the court to re-examine the entire cause.

Where Facts Uncontradicted Issue of Law Arises

Where the uncontradicted facts prove a proposition contrary to the finding of a jury, that jury's verdict must be set aside.

Both by statute and by the uncontradicted facts, Kawakita, a Japanese citizen owed allegiance to Japan.

He also was either presumptively expatriated during the period of time, or actually expatriated during the period of time involved in the indictment, and therefore under no theory whatsoever could he be guilty of treason. By international law and treaty prisoner of war camps were authorized to work former soldiers as labor battalions and to punish those who committed crimes or disobeyed the order.

In setting up the factual statement and the overt acts, respondent has, also, merely set out the evidence on direct examination. Much of this was shattered, or contradicted, on cross-examination, or the witness was shown to be incompetent, or insane.

Take, for instance, the case of Frank Mino, when one reads his direct testimony (Volume 2, Appendix C-5, page 23) one has one picture; but when one finishes reading his cross-examination, one realizes that we have the psychopathic statement of an insane man.

Examining all of the direct testimony alone makes the statement vague, uncertain, shifting and changing, with no two witnesses agreeing as to the time, place or circumstances of any of the alleged occurrences. This is not the type of testimony that could stand up in a death penalty case, nor that should support any death penalty verdict or any verdict in the criminal case.

Our Statement of Facts is a full and correct statement of facts. The trial is unusual in that most of the facts were uncontradicted except in the area of the

actual beating or striking or punishing any prisoners of war for the alleged purposes set out in the indictment, all of which appellant denied most vigorously.

In considering the facts, the court considers not only the facts presented on direct evidence but on cross-examination of the Government's Witnesses and the defense may rely on such facts. The Government has omitted the testimony on cross-examination in its *factual summary,* and in its appendix and thus has presented a misleading picture of the facts. But, where the facts are uncontradicted and stand undenied then an issue of law arises as to whether under those facts the case of treason is made out.

Cramer v. United States, 325 U. S. 1.

EFFECT OF TREATY REGARDING PRISONERS OF WAR

What the respondent has done in his brief is that he has failed in his Statement of Facts, as well as in his presentation, to consider and set out that the United States of America had a treaty with Japan, pursuant to the terms of the Hague Convention regarding the treatment and care of prisoners of war. This treaty, pursuant to the Constitution of the United States, constituted the Supreme Law of the Land and is a limitation upon Title 18, Section I, defining the crime and punishment for treason.

By the terms of this treaty and its operation, there can be no treason in a prisoner of war camp operated by a foreign power under the Rules and Regulations governing such prisoner of war camps and under the terms of the treaty thereof.

Otherwise, every prisoner of war who lifted a rock, or ran a train, or grew any vegetables would be guilty in a broad sense of treason for "giving aid and comfort" because he was doing some work for the enemy.

But, all of this was and is authorized by the Hague Convention and working in a prisoner of war camp as an interpreter thereof, requiring the men to perform the work they were required to perform, could in no sense be acts of treason. Nor, does the indictment itself charge that these are acts of treason. It is implicit

in the indictment itself that working as an interpreter in the P. O. W. camp is not charged as "treason"; but only allegedly the doing of his work in efficient or more than efficient manner charged as treasonable.

Thus, overt act (a) does not charge Kawakita committed treason by acting as an interpreter, or because he ordered a man to work who was not working; but because he allegedly came up and "told Toland to get to work and kicked him." When Toland stated he was sick, Kawakita replied "that is no excuse." And, in overt act (b) it is not alleged that the punishing of Grant for stealing from the Red Cross store room was treasonable, or that it was not permitted under International Law to punish Grant for the serious crime of the theft of scarce articles, and cigarettes; but only that the appellant assisted the Japanese Military Guards in carrying out their punishment in a form which was not to the liking of the pleader. But such type of punishment does not convert the non-treasonable act into treason. In overt act (c), it is not contended that it was improper to punish the prisoners of war for cutting up government property; the objection is to the manner of punishment. The same may be said of all the other overt acts. Each of them is lacking in treasonable quality and characteristics.

THE FOLLOWING FACTS ARE UNDISPUTED:

I.

That Camp Oeyama, the prisoner of war camp, was operated pursuant to International Law and the treaty of the United States with Japan, entered by an exchange of telegrams between the United States and Japan. (See Exhibit CW-CT and CC and page 2 et. seq. of Appellant's Opening Brief) and that the treatment of prisoners of war and their conduct was operated pursuant to this treaty, which is the Supreme Law of the Land.

The appellee ignores entirely this treaty arrangement with Japan and the right under International Law to maintain prisoner of war camps to utilize the labor of prisoners of war, and that "Article 4. Prisoners of war are in the power of the hostile Government". and "Article 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary."

It is the appellant's position that since prisoner of war camps are authorized by International Law and Treaty and are the Supreme Law of the Land that one working in a prisoner of war camp, for the job for which he has been drafted by the foreign government, cannot be guilty of treason either in the performance of such

duties or in performing them in excess of zeal in the performance of such duties, and that working in such capacity does not make treason, nor the performance of assistance to those in charge of such capacity cannot constitute treason.

Nor do we construe the Government to claim in either its indictment or in the evidence that *working* as an interpreter in a prisoner of war camp of itself constituted treason. The Government's position seems to be that because it is alleged that the prisoners of war being Americans were ordered to work when they were not working—although they were required to work——constituted an excess of zeal which made the otherwise legal act treasonable, or that assisting the military personnel in carrying out the punishment for acts of insubordination, theft and dishonesty and destruction of government property in a manner in which these military authorities were carrying it out constituted treason.

It is not contended that punishment for theft was not authorized nor is it contended that punishment for cutting up government property was not authorized, nor that punishment for disobedience for subordinance was not authorized. It seems to be the Government's position that the manner of carrying out this punishment made the otherwise authorized act under International Law "Treasonable." In this respect the Government has sought to convert what otherwise might be designated as a *War Crime* into *Treason.*

We do not mean to say by this argument that the acts charged were sufficiently proved by two witnesses, or established at all, or that the character of the testimony was such as to be worthy of credence and sufficiently substantial to establish the acts; but we do maintain that even if it was it could in no sense be treasonable because of the argument hereinabove presented. This argument has not been met in any wise by the Government. It has chosen to ignore entirely the Treaty arrangement between the United States and Japan, and the lawfulness of prisoners of war camps. When we start with this premise and with the applicable law pertaining thereto, we can well understand the appellant's position, namely that:

(1) The indictment fails to state an offense against the laws of the United States because it merely charges that the acts alleged occurred in Japan in a prisoner of war camp, maintained by a then existing sovereign under International Law, for acts otherwise authorized but performed in excess of zeal or because the prisoners of war were allegedly in a weakened condition; (due to two years in the Philippines with which appellant had nothing to do, and their shortened food supply—brought on by our own victorious march).

(2) The evidence regarding the eight overt acts shows that these alleged acts, being performed, allegedly, in a prisoner of war camp in Japan in connection with the disarmed *labor* battalion which formerly consisted of members of the United States Armed Forces, but no longer were members

of the armed forces, could not in any wise be treasonable because of the very nature and quality of the acts and the place of their performance, to-wit, a prisoner of war camp operated pursuant to Treaty Series No. 539 between the United States and Japan, and that jurisdiction regarding these acts was purely local. If Kawakita did these acts (and these we most seriously deny) and was authorized to do them pursuant to the Treaty and the operation of prisoner of war camps, and its lawful regulations, he could not be guilty of treason because he did the things which were authorized by International Law If the acts were unauthorized because of the manner of their performance or carrying out, then he was violating the laws of Japan and the Rules and Regulations of prisoner of war camps in Japan (a copy of which is in evidence in the case) and his acts could not be "aid and comfort" to the Japanese Government, whose own laws he was violating, in this event.

We pause here to point out that most of the prisoners of war in this camp had come from the Phillippines, where they had suffered previous inadequate supply of food and had been ill, and were in a weakened condition when they arrived in Camp Oeyama. Their lack of nutrition and the condition of which the Government complained had been acquired by them long before they reached this camp, and long before they were assigned to duty in this camp. The Memorandum of Dr. Bleich shows this. Kawakita seems to be blamed by the appellee for a condition which the men had ac-

quired long before this time. He is being blamed for a condition which the Government knows—or ought to know—existed from previous treatment at the hands of Japanese Military from 1941 on, and the prisoners did not reach Camp Oeyama until 1944.

It is further the appellant's position that there could be neither "aid" or "comfort" to the enemy government under the charges against Kawakita in the prisoner of war camp.

"Aid and Comfort" has been defined in *United States v. Cramer,* 325 U. S. 1, as "aiding the enemy government win the war or the government of the United States to lose the war." This, too, is subject to the provisions of International agreement in the conduct of prisoner of war camps.

It is not contended by the government—as, indeed, it could not be in view of the treaty between the United States and other powers regarding the maintenance of prisoner of war camps—that Kawakita's working in the prisoner of war camp constituted treason. Indeed, the government made quite a point of the fact that Fujisawa, in the identical position of Kawakita and working as an interpreter, was not guilty of treason. It was the government's contention throughout the trial that because Kawakita allegedly did things which it claimed Fujisawa did not do—namely, caused a prisoner of war to work when he was not working, by kicking him, or because he ordered a man to carry two buckets of paint

instead of one, when two was required, or assisted the military, allegedly, in the punishments that they were carrying out—that this *excess* constituted treason.

It is our position that the camp was operated and the work was authorized and Kawakita was drafted for the work. Even if it be conceded for the sake of argument, that he did his work with more zeal than Fujisawa and assisted the Military, (which we deny), such "excess" could not convert an otherwise lawful act into an unlawful act nor could it make "aid and comfort" out of non-treasonable conduct, no matter whether it appeals to the popular imagination or the ex-soldier or not.

We re-state our position that treason could not be committed in a prisoner of war camp in a foreign land by one working in that camp as a draftee, acting under International Law and performing only acts therein with relation to the disarmed labor battalion then within the power of the hostile government and subject to all the laws, regulations and orders in force in the armies of the detaining power.

The Government's brief speaks much of the conditions of the prisoners of war. (Appellee's brief page 14). It is unfortunate that these men, most of whom were captured in Battan early in 1942 and had suffered from the inadequacies of the food in the Philippines for two years, were suffering from Beri-Beri and slowly starving to death, aided largely by the American

encirclement of Japan so that a terrific food shortage was caused not only for the military but for the civilian population (see Defendant's Exhibit on Exchanges of Telegrams of the State Department); but this seems to blame the whole condition on poor little Kawakita, a young drafted interpreter—who could not change the lot of the men if he wished—and who was unfortunate to be found in the United States of America after the war and had about as little to do with the unfortunate physical condition of the American ex-soldiers as any individual in Japan, and was unfortunate enough to be spotted in the United States of America, by an ex-prisoner of war who wanted to kill him when he saw Kawakita in the United States.

The Government's Brief ignores entirely the Treaty arrangement regarding prisoners of war, and nowhere even mentions or discusses this feature which we set out at length in our Opening Brief. The Government did not even give any of the Statutes or Regulations regarding prisoner of war camps.

It is our position that Kawakita—drafted by the Japanese Government to act as an interpreter in the prisoner of war camp—gave no aid and comfort by such employment to the Japanese government in any of the overt acts found by the jury, both by International Law and Treaty; his work in such capacity was authorized; he was compelled by law to perform the work, and none of the acts could, therefore, contain any intentional, wilful, unlawful or felonious acts on his part,

nor any treasonable intent to betray the United States of America in the performance thereof. Nor, could there be inherent in such acts any character or quality of the definition of treason—a betrayal of one government to the forces of another government.

II.

The second undisputed fact contained in the court's instructions to the jury is: THAT KAWAKITA WAS AT ALL TIMES A CITIZEN OF JAPAN, AND THAT HE WAS RESIDING IN JAPAN AND WAS RECOGNIZED BY THE JAPANESE GOVERNMENT BY ALL OF ITS ACTS AS BEING JAPANESE.

This concession by the Government—in fact this instruction by the court—necessarily removes Kawakita from any possibility of being guilty of treason. As a Japanese citizen, he owed 100% allegiance to the government of Japan while residing in Japan.

Conversely and correctly we held that Japanese residing in the United States owed one hundred percent allegiance to the United States otherwise we would not have drafted them into selective service. *Okamato v. U. S.,* 152 Fed. (2) 905; *Talaguma v. U. S.,* 156 Fed. (2) 437; *Fujii v. U. S.,* 148 Fed. (2) 298.

The doctrine now advocated by the government is the doctrine of the totalitarian governments that a

person born in their country is always a citizen of that country, and no matter where he lives nor what citizenship he takes on he still owes allegiance to the country of his birth. This was the doctrine of Germany; this was the doctrine of Russia, and of Japan. It was disavowed by the United States, by Attorney General Black in 1859. Since that time, our policy has been consistently and constantly against this totalitarian doctrine now attempted to be placed in force by the Government in this case. As the result of this announced policy by the Attorney General, Title 8, Section 800, called the Right of Expatriation, was adopted. (See Appellant's Opening Brief, Appendix, page 10).

This section disavows the right of any foreign state to claim allegiance of a citizen of the United States while residing in the United States, or to impair the citizenship of one living in the United States because he was born in a foreign country, or because that foreign country claims that he still owes allegiance to that country and is subject to its laws and its drafts because he was born in that country. This is the identical claim made by the government of the United States in the instant case. It asserts that because Kawakita was born in the United States he owes allegiance to the United States, even though he is living in Japan, and is a citizen of that country when that country is at war with us.

But, his allegiance to Japan by reason of his Japanese citizenship and while residing there had to be of necessity 100% allegiance.

Luria v. United States, 231 U. S. 9, 28;
Murray v. The Charming Betsy, 6 U. S. (2d Cranch) 64, 122 L. Ed. 208;
Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890;
Carlisle v. United States, 83 U. S. (16 Wall.) 147, 154, 21 L. Ed. 426;
Oyama v. California, 332 U. S. 633, 666;
Fujii v. United States, 148 F. (2) 298.

III.

Another undisputed fact in the case is: THAT KAWAKITA WAS A DUAL CITIZEN

That such dual-citizenship is recognized not only by the United States by its State Department (See *Perkins v. Elg,* 307 U. S. 325) but that as such dual-citizen he was residing in Japan and, therefore, owed paramount allegiance to the country of his residence and of which he was already a citizen.

The government brushes off this matter lightly. (See Appellee's Brief, pages 89-90).

The doctrine therein enunciated by the government is not the policy of the State Department nor of the United States of America, nor is it the policy set out by Statute in the Nationality Act of 1940 itself, which makes certain provisions for dual citizens, thus recognizing that dual citizens have paramount obligation to the country of their residence and of their other citizenship.

The government chooses to ignore entirely the State Department Bulletin and policy regarding dual-citizenship. (See Appendix to Appellant's Opening Brief, page 15, containing the Bulletin of the State Department; also see Code of Federal Regulations regarding Dual Allegiance set out in Appendix, page 16, Opening Brief.)

The State Department itself not only recognizes dual-citizenship but has instructed all its consultate agencies, while a person who has dual nationality resides in the United States, the right of the United States to his allegiance is paramount to the right of the other country of which he may be a citizen, and while a person who has dual allegiance is residing abroad in a country of his citizenship he owes allegiance to that country paramount to that of the United States. The meaning of the word "paramount" has been defined by the Supreme Court of the United States in the Water Litigation with the State of California and in which case the Supreme Court has held that the *paramount* obligation to the United States means "total obligation to the United States."

> *United States v. California,* 332 U. S. 19, 91 L. Ed. 1889.

In that case the word "paramount" was held to mean "absolute right in the United States towards all other claims, although the State claimed certain qualified rights." Otherwise, the paramount obligation of a

dual-citizen is defined and set out by the State Department is *the country of his residence.* This is so under International Law and the Law of Nations.

The Government overlooks completely the Treaty with Japan regarding prisoners of war camps on the question of "aid and comfort" as shown by its argument on pages 69-71 of its brief. There the government says:

> "While employed to perform solely the duties of interpreting, and knowing that he had authority from his employers and the Japanese military to do nothing *more* than interpret, he roamed the factory, mine and camp at Oeyama, wielding a wooden sword and using his fists to execute a campaign to extract from his fellow Americans the last mortal ounce of exertion in furtherance of munitions production for the Japanese war machine. This goes far beyond the minimum requirement for the giving of aid and comfort, as a matter of law."

Thereafter, it quoted a charge to the grand jury given in 1861 in the District Court of Ohio regarding aid and comfort.

But, this statement is not only a misstatement of the evidence but an attempt to import something into the case which was not there, and overlooks completely the fact that the treaty with Japan permits the establishment of war camps to do work in a foreign nation and, whether digging the earth by means of a shovel for the purpose of finding ore is authorized, the work was not

for Kawakita to determine. It was Sgt. Montgomery who told of the work in the mine, which he said consisted of digging in the dirt by means of a shovel.

This was certainly the type of "aid and comfort" which could not be in any sense treason under International Treaty. If it was treason, then every disarmed soldier who had become a part of the labor battalion and was no longer a soldier would be guilty of giving "aid and comfort" to Japan and if he refused even though he might be shot. Also, Dr. Bleich was guilty of giving "aid and comfort" to Japan because he treated the sick and replaced a Japanese doctor in treating even members of the Japanese armed forces, or their wives if they became ill. But such did not constitute "aid and comfort" as defined by Mr. Justice Jackson in *Cramer v. United States,* 325 U. S. 1.

And, if it was not "aid and comfort" to act as interpreter, to act in any capacity in this work could not be "aid and comfort" to require the men to work who were not working, pursuant to the International Agreement. Of course, it is a complete misstatement of the evidence to say that Kawakita "used his fists to execute a campaign to extract from his fellow Americans the last mortal ounce of exertion in furtherance of munitions production for the Japanese war machine."

In only two of the eight overt acts found by the jury was there any question of doing additional work, neither involved "munition production."

OVERT ACTS

"In Overt Act (a) Toland had stopped working altogether and was doing nothing when he, allegedly, was told he had to work, and allegedly was kicked. (See Summary Appellant's Appendix, page 26.)

In Overt Act (j) John J. Armellino was only carrying one paint bucket when he was supposed to carry two paint buckets and the defendant ordered him to carry the two paint buckets, and allegedly struck Armellino. (See Appendix, pages 50-51, R. Tr. 1218 et seq.)

None of the overt acts, including these, show any effort to "extract from his fellow American the last mortal ounce of exertion in furtherance of munitions production for the Japanese war machine."

One of the other overt acts related solely to getting a prisoner of war back to the camp three hours earlier than he got back, after injury. And the other five overt acts related solely to allegedly assisting the military in punishing prisoners of war for crimes and violations of regulations they committed in the camp. Thus, within a period of a year covered by the indictment the government was able to produce evidence that on one occasion Kawakita kicked one man who wasn't working, and on another occasion he struck a man who was carrying only one paint bucket instead of two.

If the government should conclude from such frail evidence that "Kawakita hounded, beat, threatened, cursed and drove the American prisoners of war to greater production of nickel ore to be delivered under war contracts to the Japanese government," such a broad misstatement of the evidence can only be attributed to blind ignorance of the facts or patriotic fervor.

Such alleged facts, if deemed proved, were not aid and comfort to the government of Japan.

Surely they did not help Japan toward winning the war or the United States to lose the war. (*Cramer v. U. S.*, 325 U. S. 1.)

These overt acts are, in relation to the high crime of treason, ridiculously insignificant.

Here they deal with acts that are "trivial and commonplace;"

Cramer v. United States, 325 U. S. 1, 35.

His work in the prisoner of war camp, his enforcing discipline therein were acts which are authorized under treaty agreements with Japan.

In *United States v. Stephan,* 50 Fed. Supp. 738, 745, approved in *Stephan v. United States,* 133 Fed. (2d) 87, cert. denied 319 U. S. 781:

> "Our forefathers did not want Congress to be able to take spitting in somebody's face, or any-

thing of that kind, as being treason so they tell the Congress itself what it is."

The government certainly was hard put to it, when they had to claim that these two alleged overts acts (thoroughly denied by the defendant and shown to be inconsistent from the government's own proof as to time, place and circumstance) during the period of a whole year of appellant's alleged activity in this camp, to charge treason.

Surely this proves that the defendant was being prosecuted merely because he came back to the United States, and to make a hoop-la for the United States War Veterans.

May we not call a spade a spade and this treason trial a travesty on justice?

As the government has not followed our order in the reply brief but has set up its own categories and its own targets to shoot at, we have likewise found it difficult to reply in the order in which the government has set out the points, as it has taken the less significant matters first and omitted some of the most important matters. It has also quoted only the direct testimony of witnesses and omitted the shocking battering of the cross-examination, which destroyed the effect of the direct testimony such as it was.

But, even taking its own order of proof on the main issues of treason itself, we find nowhere does the government set out that each of the overt acts were proved

by sufficient, substantial and concrete evidence of two witnesses to each of the *same* overt acts at the same time, place and circumstances. In our Opening Brief, we set out a complete summary of all of the substantial evidence as to each overt act, showing uncertainty, unlike, and divert remarks as to time, place and circumstances, of the court and which are insufficient to prove the overt acts by the credible testimony of two witnesses, as to each overt act. Although appellee purports to discuss this subject under Title VII, page 104 et seq. of his brief, we find nowhere therein, however, any remarks pointing out specifically, that any two witnesses testified by direct testimony to the identical overt act as found by the jury. Whereas Toland put a cross on a map as to a place where he said it occurred and set out that the event occurred in June. (Summary, Appellant's Brief, appendix 26), no specific date is given. The other witnesses all placed the time at different months and different periods and different places. This is not direct testimony of an eye-witness as to an exact time and place. By his testimony, Toland himself has elected the date and time and exact place on the map. The other witnesses were bound to conform exactly or there was not two eye-witnesses to the identical act at the identical time and place.

People v. Waits, 18 Cal. App. (2d) 20;
See *People v. Morris,* 3 Cal. App. 1.

Likewise, the first witness to each of the occurrences by the eye-witnesses, we deem to be an election of the designated time, place and circumstances of the occurrences, yet none of the other witnesses fixed the identical occurrence at the identical time or place. We respectfully submit that the constitutional requirement has not been met, nor has the government met our position in its argument. The jury cannot arbitrarily disregard the evidence and make a finding by reason of patriotism, surmise and conjecture. The evidence must be most exact and explicit, and the court in reviewing the most serious charge must review the evidence to determine such facts.

We think that the evidence shows further:

(1) That during the period specified in the indictment, the appellant was a Japanese citizen (which was the instruction of the court itself) owing allegiance, therefore, to the government of Japan in an area of 100% allegiance—not a divided allegiance or partial allegiance—while living in Japan.

(2) That while the appellant was a Japanese citizen, owing allegiance to the Government of Japan, he adhered to the government of Japan which, although an enemy of the United States, was not an enemy of the defendant; nor was he a part of the enemy country, nor did he become drafted in the services of Japan and work with intent to betray the United States, as charged in

the indictment. He was faced with the contingency of either obeying the draft and performing the duties assigned to him, or to be shot.

(3) That the overt acts were not proved to have been committed as charged in the indictment.

(4) That there was no "aid and comfort" to the Government of Japan as those words are charged. He did not aid Japan in winning the war, intending to win the war, nor in helping the United States to lose the war. As the court once aptly remarked during the trial, the United States won the war—Japan lost the war. This is not the kind of conduct which was meant by the meaning of the words "to give aid and comfort" in the Constitutional definition.

(5) That there was no intent to betray the United States.

To hold that he intended to betray the United States by such conduct is to distort the ordinary meaning of the word "betray"; to give it a strained construction not contained in that word.

THE LAW OF NATIONALITY AND EXPATRIATION

Under this heading the government concedes, as it must:

THAT IF KAWAKITA WAS EITHER NOT A CITIZEN OF THE UNITED STATES, OR WAS NOT A PERSON OWING ALLEGIANCE TO THE UNITED STATES, HE WOULD NOT BE GUILTY OF TREASON.

The government ignores the undisputed evidence to say that the jury having found against him was sufficient.

Where the facts, as here, are undisputed and not in contradiction the question is purely one of law which must be decided by the court.

It is undisputed, and the court so instructed the jury, that Kawakita was at all times a citizen of Japan, owing allegiance to Japan. But, the court also instructed the jury, in contradiction to this instruction, that this did not make any difference—that he still owed us allegiance. The question is, was he owing allegiance to the United States?

But, we again assert that Kawakita was a Japanese citizen owing allegiance to Japan, and as such it was a part of his duty to Japan to give his loyalty entirely to that country, while residing therein. It was his paramount obligation, recognized by our State Department and so proclaimed to the world. He, therefore,

was not a person owing allegiance to the United States at any time mentioned in the indictment. This is a pure question of law on the undisputed facts of the case, and the finding of the jury is of no concern and is an arbitrary disregard of this pure question of law.

The Government contends incorrectly in its brief that loss of nationality is governed exclusively by the Nationality Act of 1940. We have set out in our opening brief, the history of the Nationality Act of 1940, and the Legislative history shows that the Act of 1940 was not meant to be the exclusive means of losing nationality, however.

It is appellant's position that Kawakita being a Japanese citizen did not have to do anything set out in (b), (c), (d), (e), (f) or (g) to become a Japanese citizen. He already was a Japanese citizen owing allegiance to Japan.

But, if he was required to do any one of the acts set out in (b), (c), (d), (e), (f) or (g) of the Nationality Act, he complied with several of those sub-sections;

For instance, (b) "Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state," Kawakita's entry of his name in the Koseki (the formal family register) as a citizen of Japan constituted a formal declaration of allegiance to Japan. Likewise, his having daily pledged his allegiance to the Emperor of Japan in this war factory

constituted such an affirmation and declaration of allegiance.

As to (c), "Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he *has* or acquires the nationality of such foreign state," Kawakita had the nationality of Japan and his serving in a prisoner of war camp as an interpreter was such a participation in and with the armed forces of Japan as to constitute compliance with sub-section (c) as a matter of law.

As to (d), "Accepting, or performing the duties of, any office, post, or *employment* under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible," it appears from the uncontradicted testimony that the company was in the employment and it is so contended by the government that the company was working under the government of Japan. Kawakita accepted and performed the duties in and connected with that employment, and the evidence is uncontradicted that only nationals of Japan were eligible for such employment.

But, we take the position that Kawakita, being already a Japanese citizen, did not have to do any of these acts. The only section that applies to Kawakita is section (a) of the Nationality Act, which gives him an opportunity to elect his citizenship at the age of 23 by expatriating himself as an American citizen "by his own voluntary act" or "by failing to return to the

United States within two years and taking up permanent residence in the United States."

The main and the only question in connection with the defendant's nationality, under the Nationality Act of 1940 or under International Law is whether the United States under the Nationality Act of 1940 or by International Law recognizes "dual citizenship" or not.

If it does recognize such dual citizenship, then it does recognize that the defendant was a Japanese owing allegiance to Japan. The Government stipulated and the trial court gave instruction to that effect during the defendant's trial.

If the law and the Government recognize that the defendant had dual citizenship during 1944 and 1945, then the defendant cannot be guilty of treason as charged. And as a matter of law, the Government is estopped from charging the defendant of the treason.

Japan was not an enemy state so far as the defendant is concerned; giving "aid and comfort" to Japan by Tomoya were parts of his duties to Japan as a citizen of Japan.

The right of election theory is not based on the Yasui case alone as claimed by the Government (see page 97) but decisions in *Petition of Doyle,* 293 N. W. 614, and in *Haaland v. Attorney General,* 42 F. Supp. 13, and *Perkins v. Elg,* 59 S. Ct. 884, equally held that "if a child born in the United States is taken during

minority to the country of its parents' origin where its parents resume their former allegiance, the child does not thereby lose his citizenship in United States, provided that on attaining majority he elects to retain that citizenship and to return to United States to resume his duties, . . . "

Under the decisions, such a person must elect, upon attaining his majority, whether he would accept citizenship in the United States or give his allegiance to the emperor of Japan.

The election is mental act which can be discovered by a tribunal as can criminal intent, knowledge or any other mental state, and "such a mental state may be found in a criminal case contrary to the sworn evidence, protestations, and declarations of a defendant."

Yasui v. U. S., 48 Fed. Sup. 40.

The Government's contention that "His so-called 'election' is of no significance." He was already, under the law of Japan a Japanese citizen.

That is to say, under Japanese law, the fact of his birth to Japanese parents resulted in a claim by the Japanese government of him as a citizen. His 'election' did not alter the fact of his birth to Japanese parents, nor did it alter the basis on which Japan asserted its claim to him as a citizen," is out of reason because (1) the 'election' as used in the defendant's brief does not mean "obtaining"; (2) because the defendant who was born in the United States and who was taken to

Japan while in minority, had right of election as to his citizenship—whether he shall retain his American citizenship or give his allegiance to Japan—when he arrived at his majority; (3) because the defendant had two citizenships—American and Japanese—and for that reason there can be an "election." That is to say, that, if one has only one citizenship, there cannot be "election" under Subsection (a) of the Nationality Act of 1940.

3. The government acknowledged the fact that the defendant intended to be a Japanese, that is, the fact that he elected to be a Japanese rather than an American citizen. At page 75 of the Government brief there are the followings:

> "Kawakita's intent was fully proven by evidence of the environment in which he acted; it was fully proven by evidence of the interchange between him and the prisoners of war. The 'give and take of the situation' appears strikingly from the record almost in its entirety.
>
> "Kawakita's intent to be disloyal to the United States and at the same time be loyal to the government of Japan is proven by his own direct testimony."

And again at page 93:

> "There was before the jury the testimony of Kawakita that he entered his name in a document known as a Koseki Tohon, or family register, and that he thereby intended to be a Japanese."

4. The Government contends that (see page 92 of the Government's brief):

> "The Congress by enacting the provisions of the Nationality Act of 1940 intended to clarify the law as to dual nationals by specifying a definite method of terminating the dual citizenship and of electing exclusive United States Nationality."

A first question in connection with the foregoing paragraph is *which part of the said Nationality Act does provide such a definite method of terminating dual citizenship and of electing exclusive United States nationality?*

The subsection (b) thereof does not necessarily apply to a person who has dual citizenship only;

Subsections (c), (d), (e), (f) are applicable to an American citizen who gives his allegiance to a *foreign state;* serves in the armed force of a *foreign state;* perform the duties of any office, etc., of a *foreign state;* votes in a political election in a *foreign state;* or makes a formal renunciation of nationality before a diplomatic . . . officer of the United States *in a foreign state.* That is to say, that such an act on the part of an American citizen should have been done in a foreign state in order to lose his American nationality. If one has a citizenship in that particular "foreign state" then that country is not a foreign state to him. It is his country. Therefore, Subsections (b), (d), (e) and (f) are not applicable or are not intended to apply to

an American citizen who has dual citizenship, but only subsections (a) and (c).

Subsections (g), (h), (i) and (j) are not pertinent in the matter.

Then and in that event, which portion of the Nationality Act does apply to dual citizenship? The only portion which provides anything about a person who has dual citizenship is the subsection (a) thereof and (c). The subsection (a) provides a definite method of terminating dual citizenship and of electing United States nationality as contended by the Government. Subsection (c) applies to dual citizens who go into the armed forces in the country of their other citizenship.

Thus, while the Government insists that: "His so-called 'election' is of no significance. He was already, under the law of Japan a Japanese citizen" (see page 94 of the Government's brief); that the Yasui case is not applicable to the defendant (see page 97 of the brief); and that "The exclusive means of losing nationality" are (1) Taking an oath . . . of allegiance to a foreign state; (2) entering . . . in the armed force of a foreign state . . . ; and (3) accepting or performing the duties of any office . . . of a foreign state . . . for which only nationals thereof are eligible; it admits a definite method of terminating dual citizenship and of electing exclusive United States nationality is provided in subsection (a) thereof

and (c) thereof by becoming connected with the armed forces. We think working in a P. O. W. camp under army jurisdiction is such a connection.

The subsection (a) provides among others that . . . to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that *he has elected to be an American citizen.* Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; in other words, in case of a child or minor who has dual citizenship and who resides in that particular country in which he has also a citizenship besides his American nationality, must return to the *United States before he shall have attained the age of 23 years;* or in case of adult at the time the Act took effect, he must return to the United States within two years from the effective date of the Act. And failure to so return to the United States on such persons (who have dual citizenship, but not any other American citizens) shall be deemed that such persons have "elected" not to be American citizens. The word, "elected" is to be applied either way under the subsection (a) thereof.

ELECTION OF CITIZENSHIP BY A PERSON WHO HAS SO-CALLED DUAL CITIZENSHIP

In *U. S. v. Minoru Yasui,* 48 F. Supp. 40, the court said as follows:

> "A person by virtue of his birth in the territorial limits of the United States and notwithstanding the fact that his parents were alien Japanese incapable of naturalization in the United States had under the Constitution conferred upon him the right of citizenship,
>
> "But by international law *he was also a 'citizen' of Japan, and had upon attaining majority, the right of ELECTION as to whether he would accept citizenship in the United States or give his allegiance to the Emperor of Japan.*
>
> "The ELECTION upon attaining majority, by persons born of alien Japanese parents, incapable of naturalization in the United States, whether he would accept citizenship in the United States or give his allegiance to the Emperor of Japan *IS A MENTAL ACT WHICH can be discovered by a tribunal as can criminal intent, knowledge or any other mental state,* and such a mental state may be found in a criminal case contrary to the sworn evidence, protestations, and declarations of a defendant."
>
> " . . .
>
> "That a person born in the United States of alien Japanese parents, *after* his majority, *continued to reside in the United States was a circum-*

stance which raised an inference that he intended to claim citizenship in the United States."

(The above is quoted from "GENERAL DIGEST" page 329)

. . .

"In the absence of a treaty or statute to the contrary, a minor child who is a citizen of the United States by municipal law *acquires a dual nationality when taken by its parents to a country under the laws of which the child is deemed a citizen,* and the child's United States citizenship is not lost *unless, on attaining majority, the child either fails to elect to retain that citizenship and return to the United States* to assume his duties or voluntarily renounces or abandons his United States nationality and allegiance."—*Petition of Doyle,* 293 N. W. 614. (General Digest 12, p. 339.)

RIGHT OF ELECTION

"If a child born in the United States is taken during minority to the country of its parents' origin where its parents resume their former allegiance, the child does not thereby lose his citizenship in United States, provided that *on attaining majority he elects to retain that citizenship and to return to United States to resume his duties,* . . . " *Haaland v. Attorney General of U. S.,* 42 F. Supp. 13.

. . .

"A child born in the United States and taken during minority to the country of his parents' origin, where his parents resume their former

allegiance, does not thereby lose his citizenship in the United States, provided that *on attaining majority he elects* to retain that citizenship and to return to the United States to assume its duties." *Perkins v. Elg,* 59 S. Ct. 884 (see 8 General Digest, p. 395).

A PERSON WHO HAS A DUAL CITIZENSHIP HAS THE RIGHT OF ELECTION TO ACCEPT ONE CITIZENSHIP AND ABANDON THE OTHER.

The authorities quoted in the foregoing two pages clearly show that Tomoya Kawakita did not have to "obtain naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person" to lose his citizenship in the United States.

Tomoya Kawakita had the right of election to accept the Japanese citizenship and abandon his American citizenship and the ELECTION is a mental act which can be discovered as can any other intent and mental state, and is established or corroborated by physical acts or documents to each.

1. *The fact that he, after his majority, continued to reside in Japan and failed to return to the United States to assume his duties;*
2. *The fact that he, after his majority, failed to return to the United States and take up permanent residence therein within two years from the effective date of "this chapter";*

3. *The fact that he, after attaining the age of 23 years, continued to reside in Japan without acquiring permanent residence in the United States;*
4. *The fact that he, after attaining his majority under Law of Japan, caused his name to be registered in his uncle's FAMILY REGISTER RECORD in the Registrar's Office in the City of Suzuka to revive and resume his dormant Japanese nationality conferred upon his birth and to reaffirm allegiance to Japan;*
5. *The fact that he, after the registration in said Family Register, caused Tokyo Mejiro Police Office which had him under its supervision since the war started, to lift all restrictions against him (as an alien American citizen);*
6. *The fact that he, after said registration, applied for a job with a copy of said Family Register Record which showed that he was then a full-fledged Japanese at the Tokyo office of the Oyeyama mine;*
7. *The fact that he, after said registration, was drafted under Personal Service Draft Act which was applicable to Japanese nationals only and assigned to the said Oyeyama mine;*
8. *Passport: The fact that Tomoya went to China with a Japanese passport.*
9. *The very facts charged in the indictment that he gave "aid and comfort" to Japan during the period specified in the indictment and gave his allegiance to the Emperor of Japan;*

10. *The fact that his said registration in the Family Register Record was voluntary submission to all duties of the Japanese subjects including military services and such an act was in effect the taking of an "oath" of allegiance to Japan; (In Japan all males whose names were registered in the Family Register Record and over the age of 20, were subjected to the military services. And particularly so in time of war. If any men whose names were not registered in the Family Register Record in 1943, 1944 and 1945, registered his name in said Family Register, he in effect submitted himself to military service.)*

See *Savorgnan v. U. S.,* 94 L. Ed. (Adv. 206, 208).

In *De Cicco v. Longo,* 46 F. Supp. 170, the court ruled that such "voluntary submission to military service was in effect the taking of an oath of allegiance to Italy in 1915 *within the meaning of the Citizenship Act of 1907 that American citizenship should be lost by taking an oath of allegiance* to a foreign country."

All of the above mentioned facts were circumstances which showed that Tomoya Kawakita exercised his right of ELECTION to be a Japanese citizen and determinations to discontinue American citizenship.

Savorgnan v. U. S., 94 L. Ed. 203, 206-8.

The determination as to whether Kawakita made an election while in Japan was a subject for that government's decision under International Law that government recognized that Kawakita elected Japanese Nationality. It gave him the freedom of the country by removing previous "alien" restrictions. It required of him the duties of its citizens as a draftee and gave him its benefits of protection in a Japanese passport to go to China and a ration card of the type given to its citizens. By International Law and our own declared policy Japan's determination is binding on us.

THE MOST IMPORTANT QUESTION IS WHETHER OR NOT TOMOYA KAWAKITA HAD A DUAL CITIZENSHIP UNDER THE RULINGS OF THE YASUI CASE.

If he had the dual citizenship, there can not be any treason charges against him under the circumstances; but if he did not have dual citizenship at any time during his stay in Japan, theoretically or otherwise, the Government of the United States might properly charge him with treason if he had only the citizenship of the United States.

Kawakita's Japanese Nationality

1. Tomoya Kawakita re-affirmed Japanese nationality under the Japanese Nationality Act, as interpreted by Japanese Attorney General, Yoshio Suzuki.

2. Tomoya Kawakita caused his name to be registered in a FAMILY REGISTER RECORD on March 8, 1943, upon his own free will. And such act was deemed to be an act of reaffirmation of allegiance to Japan, according to said Yoshio Suzuki, attorney general of Japan.
3. Tomoya Kawakita ELECTED to give his allegiance to Japan and abandon his American citizenship on the 8th day of March, 1943, by registering his name in Family Register Record and thereafter by residing in Japan without acquiring permanent residence in the United States.
4. All other acts performed by Tomoya Kawakita during 1944, 1945, including acts enumerated in the indictment, and other circumstances were evidences that he elected to be a Japanese and abandoned his American citizenship under the ruling of the Yasui case.

THE NATIONALITY ACT OF 1940 MAKES DISTINCTIONS BETWEEN AN AMERICAN CITIZEN WHO HAS NO DUAL CITIZENSHIP AND ONE WHO HAS A DUAL CITIZENSHIP.

1. While an American citizen may reside in a foreign country after he has attained the age of 23 years without acquiring permanent residence in the United States and *retain that citizenship,* if he does not have citizenship in that particular foreign country, those who have citizenship in that foreign country *can not retain* their American citizenship if they reside therein after they have attained the age of 23 years without acquiring permanent residence in the United States.

The above mentioned DISTINCTION should be taken into consideration when one tries to understand the meaning of the law. And furthermore, the words, such as "ELECTED" and *"SHALL BE DEEMED TO BE A DETERMINATION,"* should not be passed upon lightly. That means that:

a. The 1940 Nationality Act itself give *the right of ELECTION to a person* who has a dual citizenship;
b. *The law itself gives right to determine which citizenship he shall retain.*

The trial court failed to give an instruction concerning such "DISTINCTION" which was one of the

most important points in this case. That is, the court failed to give an instruction to the effect that the defendant had the right of ELECTION between the two citizenships, that the defendant, if voluntarily resided in Japan after he attained the age of 23 years, shall lose his American citizenship, and that such ELECTION on the part of the defendant was mental act which can be discovered as can any other mental state.

1. *To obtain a Japanese nationality, by a person who has no dual citizenship or Japanese citizenship*
   and
2. *To elect to be a Japanese national, by a person who has a dual citizenship,*
   Are two different things.

1. To obtain a Japanese nationality by any person over the age of 21 years, means that he has to go through the procedures provided in the Japanese nationality law;

2. He may elect to be a Japanese citizen and abandon his other citizenship if he has a dual citizenship, like Tomoya Kawakita, by registering his name in some FAMILY REGISTER RECORD, if his name was not so registered, and (2) reside in Japan after he attained the age of 23 years. *To establish residence in Japan after he attained the age of 23 years* is one of the conditions to lose the American citizenship by a person like Tomoya Kawakita.

The fact that the defendant, Tomoya Kawakita, established residence and stayed in Japan long after he

attained the age of 23 years was a circumstance which raised an inference that he intended to claim citizenship in Japan. He did not have to obtain naturalization in Japan in order to lose his American citizenship. All he had to do for the purpose (losing his American citizenship) was to elect to be a Japanese citizen, and reside therein after he attained the age of 23 years.

In this connection, it should be noted that the trial court's instruction 11-G, stated: Our law *presumes* that such action, *VOLUNTARILY TAKEN,* evidences *an intent* to renounce or abandon allegiance to the United States, and with it of course American citizenship and all rights pertaining thereto," showing that, to be an American citizen or not to be, is a question of intent and in this case a question of ELECTION.

iance is determined by the laws of the country where he actually lives, and that he must respond fully to that allegiance. Thus, in the case of the *United States v. Austria & Hungary,* it was said:

> "Citizenship is determined by rules prescribed by municipal law. Under the law of Austria, to which claimant had voluntarily subjected himself, he was an Austrian citizen. The Austrian and the Austria-Hungary authorities who are within their rights in dealing with him as such. Possessing as he did dual nationality, he voluntarily took the risk incident to residing in Austrian territory and subjecting himself to the duties and obligations of an Austrian citizen arising under the *municipal laws of Austria.*"

Hackworth, Volume 3, chapter 9, page 358.

And again, in reference to its dealings with France, the opinion of the Office of the Solicitor for the Department of State, February 23, 1910 (1910 Solicitor's Opinions, PT-1, p. 297) it was stated:

> "In regard to the compulsory military service in the French Army of a minor born in the United States of French parents, the general rule seems to be that the liability of the child in the performance of the duties of allegiance is determined *by the laws of that one of the two countries in which he actually lives.* If by the law of that country he is considered as a citizen and if his parents have not renounced allegiance to that country it appears as the general rule that the country of his birth affords the child no protection during his minority.

> It would, therefore, appear that the young German in your memorandum is liable to be drafted in the French army."

And, our country has taken the position with reference to dual citizens residing in the United States. Secretary Lansing said to Minister Eckengrin, No. 422, May 20, 1918, Memorandum Department of State, file 811. 2222-Haddon, Williams:

> "In holding that persons born in the United States of Swedish parents were subject to military service in the United States, notwithstanding the fact that they might also have the nationality of their parents, the department of state said that 'the natural presumption would seem to be that by thus returning to this country on or shortly before reaching the age at which an election might legally be made and having since remained here several years, they intended to and did elect American citizenship."

Japanese citizens, although having elected Japanese nationality by residing in the United States were nevertheless subject to military service in the United States and for the United States and were subject to criminal punishment for failing to register and perform services required under the Selective Service Act.

Fujii v. U. S., 148 F. (2) 148 F. (2) 298.

Thus, dual citizenship as involved in this case is a two edged sword because if we proclaim that a dual citizen residing in the United States still owes allegiance to his other government, it is contrary to the an-

nounced policy which we have adopted and which has constantly been understood in International law and otherwise.

THE TRIAL COURT'S INSTRUCTION THEREFORE TO THE JURY THAT IT DID NOT MAKE ANY DIFFERENCE THAT KAWAKITA HAD JAPANESE NATIONALITY AND WAS RESIDING IN JAPAN, BUT THE QUESTION SOLELY WAS WHETHER HE WAS STILL AN AMERICAN CITIZEN, THEREFORE OWING ALLEGIANCE TO THE UNITED STATES misstated the law in respect to dual citizenship and ignored the duty of one having dual citizenship owing 100% allegiance to the country in which he was residing. To hold that such a dual citizen still had a duty of allegiance to a country in which he was not residing and which was giving him no protection whatsoever and could not give him any protection whatsoever is contrary to International Law and the Law of Nations as well as the Law of the United States.

The State Department over a number of years held in the cases of persons who were born in the United States of alien parents, and thus acquired American citizenship under Article 14 of the Amendment to the Constitution of the United States and likewise acquired the nationality of the state of which their parents were citizens or subjects under its laws, that if such persons were taken abroad during their minority, and resided in the country of which their parents were nationals, they were required to demonstrate their election of the

nationality of the United States after obtaining majority or otherwise are not held to be entitled to recognition as citizens of the United States. (The Department of State to the Consul General at London, November 30, 1936, M. S. Department of State, File 130, Vince L. M.)

In the case of *Perkins, Secretary of Labor, et al., v. Elg,* 307 U. S. 325, 327, 329, 343, the Supreme Court of the United States held that a child of a foreign born national who moved from this country during minority had the right to elect to retain the citizenship acquired by birth and to return here for that purpose. Implicit in that situation, therefore, is the right of election of the foreign nationality also.

The problem of dual nationality or dual citizenship and dual sovereignty within the states of the United States has even raised questions in our own state and nation. The right of the federal government as paramount to the state government has been the subject of water litigation, wherein the Supreme Court of the United States has held that the federal government's rights are paramount and supreme.

In *Gregg v. Winchester,* 173 Fed. (2d) 512, 513 the court discusses the "dual sovereignty recognized in our federal and state constitutions." There the court said:

> "It is altogether a remarkable testimonial to the good sense of the American lawyer, both in his capacity as a judge and as an advocate that, sensing the malady as a serious one, he readily discov-

> ered and applied the remedy. The remedy consisted merely of recognizing *exclusive jurisdiction* in the court first acquiring jurisdiction of any action. It is often referred to as the rule of comity or *necessity.*''

And, in *Ponzi v. Fessenden,* 258 U. S. 254, at 259-260, Chief Justice Taft quoted with approval the doctrine that where the subject matter of litigation may be the subject of two jurisdictions, it is a principle of right and of law and therefore of necessity that the one who has jurisdiction in the first instant has exclusive jurisdiction, and that

> ''res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.
>
> 'The *Heyman* case concerned property, but the same principle applies to jurisdiction over persons as is shown by the great judgment of Chief Justice Taney in *Ableman v. Booth,* 21 How. 506, 16 L. Ed. 169, quoted from and relied upon, in *Covell v. Heyman,* (111 U. S. 176, 28 L. Ed. 390).' ''

See also *Fred F. Edward v. People of the State of California,* 314 U. S. 186, wherein Mr. Justice Jackson in a concurring opinion discusses national citizenship.

By the very charges contained in this indictment, it must be deemed that Kawakita elected Japanese nationality. Then, the determination as to whether he elected that nationality must be determined by the municipal law of that country. Thus, it must be deter-

mined that Japan recognized he elected its nationality. His name was removed from the alien register at the police station. (See the testimony of Police Officer Keyoshi Sasaki) and he was permitted to travel throughout Japan without an alien permit. He was also given a Japanese passport to go to China. He was drafted as a Japanese national into the military services of Japan, and he was given an office or post in a highly confidential position, to-wit, with the armed forces of Japan in a prisoner of war camp operated by and under the direction of the military authorities, pursuant to International Law.

It is hardly considered likely that such a post or position would be permitted to one who did not have, or was not acquiring, Japanese nationality.

The government's statement about the Chinese is misleading. No Chinese worked in the prisoner of war camp or the mine area designed for prisoners of war. Fujisawa had to obtain Japanese citizenship to get his similar job in the camp. The testimony of Fujisawa in respect to this work and his obtaining Japanese nationality by entering his name in the Family Koseki was as follows:

Q. And what sort of a job did you make application for? (Rep. Tr. 5392.)

A. As an interpreter.

Q. You said you applied at the main office in Tokyo?

A. That is correct.

Q. And can you give us—I think you said it was about July. I will show you a photograph, Defendant's Exhibit AL, and ask you if you recognize the photograph?

A. Yes, sir; that is him.

Q. Speak up so the jury can hear you.

A. Yes, sir, that in Inouye.

Q. Do you know Inouye's first name?

A. Nobuyuko.

Q. And at the time that you applied for the job did you go with Kawakita and Inouye—had the three of you then completed your university course?

A. No, sir, not yet.

Q. And will you state what occurred when you and Kawakita and Inouye went to see Mr. Hayakawa (phonetic)?

MR. CARTER: Just a minute. I object to that as calling for a conclusion of the witness unless a proper foundation is laid.

Q. BY MR. LAVINE: Will you state who was present at the time that you saw Mr. Hiyakawa?

A. Mr. Hayakawa, Kawakita, Inouye and myself.

Q. And do you remember about what date it was in July that you saw him?

A. It was in the latter part of July.

Q. And when did you see him—in the morning or afternoon?

A. I believe it was in the afternoon.

Q. And where was the place that you saw him?

A. (No answer.)

Q. I think you said earlier at Tokyo, but where in Tokyo?

A. I believe it was in the Nihonbashi (phonetic) District in Tokyo.

Q. And is that where the offices of the Nippon Metallurgical Company were then located?

A. Yes.

Q. Did you go to his office?

A. Yes, sir; I went to his office.

Q. Just the four of you were present at that time?

A. Yes, sir.

Q. Now, state what you said and state what Mr. Hayawaka said.

A. Well, since Kawakita has mentioned to me that he needed—

Q. No, just state what you recall now of the conversation between the four of you at that time, state anything that happened at that meeting.

MR. CARTER: Just a minute. Are you asking for what everybody said at that time or just what this witness and Mr. Hiyakawa said? I can't understand from your question. Are you asking for the whole conversation?

MR. LAVINE: That is what I am asking for, what everybody said at this conversation.

MR. CARTER: No objection.

THE WITNESS: Well, Mr. Hayakawa asked me whether I had Japanese citizenship or not and I told him that I did not have any and he told me that the company could not hire any for-

eign nationals and besides the prisoner of war camp will be under the direct jurisdiction of the army, so the company could not hire any foreign nationals. And he told me that I will have to get a Japanese citizenship before the company can employ me.

Q. BY MR. LAVINE: Go ahead.

A. So I told him I will apply for Japanese citizenship and then he told me for further instructions to report to the Iwataki factory in Kyoto.

Q. And what else was said at this meeting at that time as near as you can recall?

A. Between Mr. Hayakawa and myself?

Q. Yes.

A. Well, I guess he mentioned to me about the salary, the salary being the basic pay and that was regulated so they could not pay more than what the regulations state for a college graduate, but on top of that we were to receive, I think it was 30 yen as interpreter's allowance.

Q. Did he give you any instructions as to, or tell you what your duties would be?

A. He said that I was to be hired as an interpreter and for further instructions I will report to the Iwataki branch office.

Q. Now, did you thereafter apply to get your Japanese nationality established?

MR. CARTER: Just a minute. I object to it upon the ground it calls for a conclusion of the witness.

THE COURT: Objection sustained.

MR. CARTER: No objection to what actually happened.

Q. BY MR. LAVINE: Well, what did you do thereafter with reference to your Japanese nationality, if anything?

A. Well, my name was entered in the Koseki (phonetic), not in my parents' Koseki but I had to establish a separate Koseki.

Q. You established a separate Koseki?

A. Yes, sir.

Q. Were you then married?

A. No, sir.

Q. You established a separate Koseki. Will you explain to us what you did?

A. Well, I don't know—I can't recall where I went, but I think I went to the metropolitan police station and there I told them in order to work in a Japanese firm as an Interpreter I would have to get Japanese citizenship, and that I came to apply.

Q. And what happened then?

A. I didn't know until December that I had set up a separate Koseki.

Q. And that was December of—

A. 1943.

Q. Now, after December, or, how did you learn that you had set up a separate Koseki or that you were then considered a Japanese national?

MR. CARTER: Just a minute. I object to that question upon the ground it assumes something not in evidence.

THE COURT: Objection sustained.

Q. BY MR. LAVINE: How did you then know that you had set up a separate Koseki?

A. The general affairs section in Iwataki has asked me several times what became of my Japanese citizenship—that is the Koseki, and so I told them that I will apply to my parents, where my parents were born and find out what became of my Koseki and then I found out that my name was accepted and had set up a separate Koseki.

Q. And did you do anything with reference to showing that to the officials of the company?

A. Yes. I took that Koseki Tohon to the general affairs section.

Q. And did you show it to someone there or did you leave it there?

A. Yes, I think I turned it in. I don't remember.

Q. Did you consider that that thereafter subjected you to all the duties and obligations of a Japanese national?

MR. CARTER: Objected to upon the ground it calls for a conclusion of the witness.

THE COURT: Sustained. (Reporter's Tr., 5392, line 7, to 3598, line 12.)

If then the determination of whether Kawakita had elected Japanese nationality depended upon Japanese interpretation, this country was bound to follow the laws of Japan since that country determined of necessity whether he had made an election.

Furthermore, sub-sections (a) and (c) of Section 801 of the Nationality Act provides for the means of dual citizens electing the nationality of the other country in preference to their own.

While subsection (a) provides that one loses one's nationality by obtaining naturalization upon his own application or through the naturalization of a parent, if the subject, however, has dual nationality, it is not necessary for such a naturalization to take place. It gives the right of the child to elect, after becoming 23-years of age, without acquiring permanent residence in the United States, or after becoming 23-years of age expatriating himself as an American citizen by his own voluntary act to be permitted within two years to return to the United States and take up permanent residence. Kawakita did not return to the United States within two years after becoming 23-years of age.

Subsection (c) provides for the loss of American citizenship by entering or serving in the armed forces of a foreign state, if he has or acquired the nationality of such foreign state. And Fujisawa's testimony established this fact. (Rep. Tr., 3621-3628).

The government makes much of the fact that Kawakita did not wear a uniform and that he declared that he was not in the armed forces. But, such declaration or such lack of uniform cannot change the character of the armed forces. One who is so closely connected with the military operation as to be an interpreter in a prisoner of war camp operated by the military author-

ities, and who must take all his orders from the military authorities is certainly in the armed forces whether he wears a uniform, or shoots a gun or not. Our own statutes defining the army would include such a person in the armed forces.

The government has taken inconsistent positions in its brief in relation to Kawakita's work. When it discusses the matter of Kawakita's citizenship, or his loss of citizenship by working in this prisoner of war camp, it takes the position that Kawakita was working for the Nippon Yakin Kaisha Company; that it was a private company; that it had stockholders, and that it was the same as any other private job, and therefore that Kawakita was not in the employment of any governmental agency for which only citizens of Japan were eligible.

If this is true and is the accepted premise upon which the government bases its case, then the treason case must fall, for no matter how vigorously Kawakita is charged with having made the men work for *a private company* he was not giving aid and comfort to the government of Japan. Even if he kicked them in order to make them work, he was only making them work for a private company which alleged mistreatment or assault, if it occurred, was a matter purely of local concern in an organized nation and not subject to subsequent *ex post facto* punishment by the new power which took over.

There can be no question but that the retaining state may in addition to employing the prisoners of war directly permit them to work for private individuals or corporations.

And, at no time did the American Government protest the type or nature of work which was being done at Camp Oeyama as being contrary to the agreements joined in between the United States and Japan, through exchange of telegrams with its own government.

On the other hand, if this company had become a governmental agency, and Kawakita was working for it, then he lost his citizenship pursuant to the provisions of Title 8, Section 801(d). The status of a prisoner of war as merely a private citizen is set out in Floury's book quoting Lorimer regarding prisoners of war and their treatment:

> "The captive, or other non-combatant is a private citizen of the world and the rights of humanity inherent in him in that capacity, which emerge the moment he has thrown down his arms, override the rights of both belligerents. His punishment is personal, not vicarious." (Flory, Prisoners of War, page 44.)

If the company, therefore, was a private company with private stockholders and Kawakita was merely working for a private company, it would not make any difference what he did to make the men work, if he committed an assault it would be merely a local offense.

If the men did not work and were required to work to earn their pay, whatever he did to make them work could not be anything more than local in its nature. And, if the punishments were private punishments for stealing from the warehouse of the privately-owned company, it could not be treason. And, if he took the law into his own hands, it could not be treason. If he merely assisted military guards who had the supervision of prisoners of war in carrying out punishment, this could not be aid and comfort to Japan as a nation but was only helping a private concern, even though they were under military guard.

On the other hand, if this camp was a purely military camp, under the Japanese government, and was purely military in its nature, then Kawakita's employment by it under the Nationality Act of 1940, expatriated him by reason of that employment. That expatriation commenced long before the return of the indictment, as he was employed in 1943.

The nature of the work performed by these "citizens of the world," these ex-soldiers now prisoners of war, was aptly described by Montgomery as follows:

> That none of the men were engaged at any time in directly making munitions of war,

contrary to the unwarranted statements in the appellee's brief.

The appellee, on page 89 of his brief, says:

> "The appellant does not refer to this portion of the statute by section number (Title 8 U. S. C. 804) but in the context of his argument he discusses Kawakita's living in Japan more than two years. We assume therefore that he places some reliance upon this section."

The appellee has missed the point. The two years referred to in appellant's opening argument is that referred to in Section 801, paragraph (a), which provides the manner in which an American citizen

> "by his own voluntary acts"

may expatriate himself, or be permitted

> "within two years from the effective date of this chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has *elected* to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship."

The Government asserts and re-asserts that Kawakita's election is of no significance. (Appellee's Brief page 94). It asserts "he was already under the law of Japan a Japanese citizen." This, it would seem to us,

offends the lawsuit. If the government's position was that he was not a Japanese citizen, that he therefore would have to be naturalized but had become naturalized or expatriated himself as required either by International Law or under Section 801 of the Nationality Act, as in the case of Gillars (Axis Sally) their position would be different. Axis Sally testified that she only took on German nationality to get a job and that she was compelled to do so. The appellant, however, was a Japanese—Axis Sally was never German. Their positions are entirely different.

See *Gillars v. United States,* 182 Fed. (2d) 962.

But, the position taken by the Government as to the means of shedding American Nationality does not comport with either International Law or Section 801 of the Nationality Act. It is here that the government and the trial court and the appellant differ.

It is the appellant's position that under International Law and the Law of Nations that one may shed one's American nationality in a foreign land by his acts and deeds and by an election in the manner provided by the laws of that country and that, having done so, that he has expatriated himself and that the land of his birth cannot thereafter claim him as its citizen as do the totalitarian countries.

It is here that the case of *United States v. Yasui,* 48 Fed. Supp. 40, in an opinion written by Judge Fee comes into play. It is here also that *In re Territo,* de-

cided by the 9th Circuit, 156 Fed. (2d) 142, comes into play.

The *Yasui case* was reversed by the Supreme Court on other grounds, but the citizenship of the guinea-pig Yasui, an attorney, who went to the slaughter in an effort to determine the legal question of loss of citizenship under the circumstances remains unswerved, although the government, when the case got to the Supreme Court of the United States, did not raise or challenge Yasui's citizenship, a lawyer who had offered himself as this guinea-pig, and thus drew a sentence of one year from Judge Alger Fee of Oregon.

But, the cogent reasoning of Judge Fee in that case as to Yasui's conduct—not in Japan, but in the United States as a dual citizen to the Japanese Embassy—thus electing Japanese citizenship—stands as sound logic and cogent reasoning, and the loss therein was not occasioned under Section 801 of the Nationality Act, but, accordin gto Judge Fee, by International Law.

Kawakita's position is very much stronger than Yasui's. Kawakita, a Japanese, was residing in Japan and there expressed by his mental acts and physical deeds his election of Japanese nationality. He went to the Registrar at the City of Suzuki and had his name entered in the family register. This is very much like children in the United States who are born abroad, who after returning to the United States can declare their American citizenship. They do not have to do any one of the acts specified in Section 801 of the Nation-

ality Act, but by a simple declaration they assert their American nationality and American citizenship.

Kawakita was recognized by the Japanese government, under Japanese Law, to have thus made an election. He was free to go and roam where he wished. He got a Japanese passport. He was drafted under Japanese Law (See Exhibits Z; W; AB and AB1).

The government is in error in stating that Kawakita was not drafted, but was merely frozen to his job. He was given a draft number just the same as other persons who were drafted in military service, and thereafter he was continued in the particular job he had been in before, but subject to all the draft regulations of the Japanese Government. Kawakita's acts as charged in this indictment showed an election of Japanese citizenship. And, he was therefore under International Law and the Law of Nations, which is the Supreme Law of the Land, a hundred percent Japanese and owed no loyalties to the United States at the time covered herein.

The failure of the court to instruct the jury properly on dual citizenship, however, was fatal to the government's case for we believe that a correct statement of the law in respect to a dual citizen is that as to such dual citizen he owes his paramount allegiance to the country in which he is residing; and that even if he was an American citizen by birth nevertheless, if he was also a Japanese citizen, residing in Japan, he owed 100% allegiance to the Japanese government which, so

far as he was concerned, was not an enemy government but a government of his citizenship. And, that while residing there he owed it 100% loyalty.

We took this position ourselves with respect to Japanese-American dual citizens who resided in the United States and punished them for failure to observe this 100% loyalty to the United States.

We believe that the court, therefore, erred in instructing the jury that the only ways in which one might lose its nationality were set out in Section 801 of Title 8, U. S. Codes, as these are not the exclusive methods of losing nationality but only the methods *"under this chapter."*

In our Opening Brief we set out that the Legislative history of this chapter showed an attempt to consolidate the various ways and means of losing nationality "under this chapter" but that they were not exclusive of other means expressed by International Law or otherwise.

. . .

THE COURT ERRED IN THE EXCLUSION OF DEFENDANT'S EXHIBIT "CO" FOR IDENTIFICATION (THE DEPOSITION OF THE MAYOR OF SUZUKI CITY), AND THE APPELLEE IS WRONG IN HIS STATEMENT OF WHAT OCCURRED IN RESPECT THERETO, (Appellee's Brief, page 95).

After the trial date was set, appellant requested that he be permitted to take depositions of some of the Japanese officials who could not be brought here with respect to the law of Japan with relation to citizenship. A lawyer connected with the army, a Captain in the U. S. Army, was assigned by SCAP, (Supreme Commander of the Allied Powers) to take and get these depositions. His name was Captain Bernard Shandler.

Appellant sent to him the names of the persons, or the persons whose deposition he wished, to-wit, the Attorney General of Japan, the Mayor of Suzuki City, and others, with relation to the effect of entering one's name in the Koseki. As a result of this request, the deposition of the Mayor of Suzuki City was taken. The government at the trial waived any objection to the facts that the deposition was taken without its knowledge or appearance thereat because, as a matter of fact, it had been taken by a Captain in the army, under the authority of the Supreme Commander of the Allied Forces, to-wit, Captain Shandler. It was highly important to determine the procedure and the effect of

such entry in the Koseki Tohon, as regarded by Japan, just the same as we might wish to take the mayor's deposition regarding the manner of a person becoming a voter in the City of Los Angeles, or some other proper function. Certainly no one would say that Mayor Bowron was not so qualified if, upon the taking of his deposition, he testified that he was qualified.

Contrary to the government's statement, a proper foundation was laid for the qualifications of the mayor to testify. The government in the trial having

> "waived the formalities of the matter, and the facts we did not stipulate,"
>
> and "nobody authorized by me." (R. Tr. 3516).
>
> "We will waive that reserving any objections we may have to the questions and answers that were taken from the mayor. We will stipulate that he was asked those questions and that he answered them, but reserving the right to object to the admissibility of the statements."(R. Tr., 3516).

This is a far cry from the misstatement of appellee that the deposition was "excluded as being wholly without foundation." If it was sustained on this ground it was erroneous for on page 3518 the mayor was asked this question:

> "Q. Are you familiar with the laws relating to a Japanese head of the Family entering the names of those in his family as being Japanese nationals in the family register?
>
> A. Yes."

> Objected to upon the grounds it is incompetent, irrelevant, immaterial, no proper showing made of the mayor's familiarity with the laws of Japan. Asking his opinion evidenced of a purely lay-witness. (overruled the answer may stand).

Therefore, the court overruled the objection as to the Mayor's qualifications and permitted that to stand. A witness who testifies that he is a qualified witness lays the foundation for his qualifications unless on *voir dire* the opposing counsel proves that he is not familiar with the laws relating to the Japanese head of the family entering the names of those in his family as being Japanese nationals in the register.

Supposing that the same question had been asked of Mayor Bowron as to an American citizen residing in the City of Los Angeles, where he was familiar with the laws relating to whether he could register to vote and be a voter in the City of Los Angeles. Would anyone say that he had not laid the proper foundation? Every day witnesses are asked if they are familiar with a certain subject matter, thereupon their testimony that they are so familiar lays the foundation for their testimony unless on *voir dire* it is shown that they are not familiar with the subject matter. No *voir dire* testimony was taken however of the Mayor.

Thereafter, Mr. Carter objected, although such foundation had been laid as to his qualification, and in no wise challenged on *voir dire* or rebutted. Mr. Carter objected and the court sustained every objection to the

questions as to the legal effect of the head of a family entering the names of members of his family, including the nephew, in the family register. (R. Tr., 3519), and whether such procedure conformed to Japanese law that when an Uncle enters the name of his nephew in the family register at the request of the nephew residing in Japan such entry constitutes a formal declaration of Japanese nationality, according to Japanese law and procedure.

Could anyone say, if Mayor Bowron were asked if a person registered to vote whether such a registration constituted a formal declaration of the rights of a citizen to vote in the City of Los Angeles, that his answer would not be proper and valid and admissible.

The rest of the questions asked of the mayor of Suzuki City, where Kawakita had his name entered in the family registry, were just as vital to the defense. The Mayor was permitted to testify that the record showed that Kawakita's name was entered in the family register. The Mayor's answer, however, to the question as to whether such entry in the name of his family register constituted an official declaration of Japanese nationality by Tomoya Kawakita according to Japanese law was not permitted to be answered. Nor, whether the entry in that registry constituted an election according to Japanese law that he wished from that time to be considered a Japanese national. (R. Tr., 3591), and that it permitted him [according to Japanese Law] to all the rights and subjected him to all

duties of one of Japanese nationality. (R. Tr., 3521, 3522).

It is interesting to note that when the Mayor was asked if he was familiar with the personal service draft law which applied to the Nippon Yakkin Company and persons not actually in military service in Japan, he replied "No." (R. Tr., 3523).

The court, in sustaining the objection to various questions asked of the mayor did so upon the following grounds:

> "The jury will understand the questions in the deposition of the Mayor just read that is just read from Exhibit CO for Identification, as to which the court has sustained the objections, were not sustained on the grounds that the questions were not properly asked, but upon the grounds that the Mayor was not shown to be qualified to express an opinion as to the law of Japan, it not being shown that he was a lawyer or expert in the law of Japan.
>
> I made my ruling upon the assurance that there is better evidence here as to what the law of Japan is, namely in the form of a deposition from the Attorney General of Japan himself. (R. Tr., 3225)."

In this the court was in error, however. The opinions of the Attorney General did not cover the Koseki Tohon and the registry in the Koseki Tohon as asked of the Mayor of Suzuki City, where the occurrences took place; and the court was further in error that such statements had to come from a lawyer, and the court was further in error that having a deposition

from the Attorney General excluded the deposition of the Mayor of Suzuki City.

We think the exclusion of this highly vital deposition on citizenship and its effect was highly prejudicial and reversible error.

"TREASONABLE INTENT" NOT PROVED

The Government's position on the question of intent is woefully lacking in its brief (Appellee's brief, page 4). Its statement of fact constitutes a great misstatement, for instance, it says:

> "The appellant delivered the American prisoners of war into the service of the enemy, into the important service of producing munitions."

This is an absolute falsity. The prisoners of war were sent to the prisoner of war camp under International Law and pursuant to international agreements and the agreement with United States and Japan. Sgt. Montgomery took them to camp Oeyama and delivered them pursuant to his orders. Most of the men had for more than two years been prisoners of war in prisoner of war camps in the Philippines. The misstatement continues:

> "He thwarted the prisoner's efforts at continued loyalty to their country, and to his, by forcing them to work and produce for the enemy."

This likewise is a misstatement. The prisoners of war were legally bound by the terms of the Geneva conven-

tion and the agreement between the United States of America (the Supreme Law of the Land) to obey the orders of the prisoner of war camp and to perform services in them. Disobedience of such treaty agreement was disobedience of the laws of the United States itself. They could either work or starve, and International Law has deemed it better that they work and obey local laws and rules, however distasteful than that they starve.

Kawakita did not force them to work and produce for the enemy; they were required by military and international law to work and produce for the enemy.

Kawakita did not parade before the Military Commander of the camp the efficacy of his role by suggesting that prisoners of war who were then patients and too ill to work be deprived of their meager food rations to make them return to work, since there is no testimony whatever that he made such a report to Lt. Hazama. On the contrary, there is at no time any evidence that Kawakita ever reported any American prisoners of war to the military authorities for maligning, for sabotage or for disobedience. Had he done so they might have suffered a far worse fate and be subject to punishment even up to death. A conspiracy to disobey the orders of the camp was subject to the death penalty. (See Rules and Regulations regarding Prisoner of War Camps.)

The Government asserts with a general broad conclusion but without pointing out specifically, that:

> "There is an abundance of evidence upon the issue of intent, apart from the proof of the overt acts themselves. The entire setting, the bearing of the appellant, the sequence of his acts with the prisoners of war and the interchange between himself and them was proven, and established every requisite of intent."

INTENT TO DO WHAT? Certainly, none of these things showed an INTENT TO BETRAY THE UNITED STATES. The essence of the crime of treason is the specific intent to betray the United States. The intent referred to must be a specific intent directed proximately at the betrayal of the United States by levying war or by adhering to enemies, giving them aid and comfort. The nature of the betrayal has to do with the specific delivery of the United States into the hands of its enemies—a delivery, certainly, not manifested by any of the overt acts charged nor the environment of the acts, nor anything that was said or done within it.

The Government has not met our argument in the Opening Brief on this lack of specific intent to betray the United States of America. The record is entirely silent on this subject. The Government asserts that "Kawakita's intent was fully proven by evidence of the environment in which he acted." We assert that that environment disproves any intent. If Kawakita was delivering provisions to the enemy from the United States (an act in and of itself treasonable) or delivering military secrets to the enemy, or otherwise acting to

betray the Government of the United States it would be different. But, the environment in which he acted—a prisoner of war camp to which he was drafted (Exhibit W2) and assigned and which was a setting permitted by International Law for the purpose of carrying on a work battalion—was not such a setting as established any intent to betray, but contrary wise.

The appellee's brief further says:

> "Kawakita's intent to be disloyal to the United States and at the same time be loyal to the government of Japan is proved by his own direct testimony."

It is evidenced from the cases which we have cited and which we hereafter cite that Kawakita was required while in Japan to be 100% loyal to that government. Such a loyalty necessarily does not prove disloyalty to the other government; it excludes the the other government, however, from any loyalty whatsoever, and this direct testimony thus quoted proves that Kawakita acted within the scope of the State Department's own announced policy that "an American with dual citizenship, residing in the locale of one of his citizenship, owes 100% loyalty to that government." None of the things on which the appellee relies in its brief shows any intent to betray.

It is undisputed that from March 1945 until the end of the war, Kawakita was employed in a clerical capacity from 8:00 o'clock in the morning until 5:00 o'clock in the afternoon in the warehouse handling electrical

supplies. We were unfortunate in not being able to produce the hourly and daily work record from Japan which would have disproved that Kawakita was, or could have been, anywhere in the camp during these work hours as the punishment prisoners placed the acts generally before five o'clock in the afternoon, ranging from early in the afternoon until five o'clock. However, his working in that job certainly evidenced no desire to be where he could compel Americans to work or do anything else—his job did not relate to that any longer, but was a purely clerical job keeping track of electrical supplies.

In *Chandler v. United States,* 171 Fed. (2) 921, the court of appeals there observed that that case did not necessitate any detailed examination "as to how far an American citizen, caught in an enemy country at the outbreak of the war, may in order to earn a living and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid in the enemy war effort. Here, as elsewhere in the law, there may be troublesome questions of degree."

Kawakita was a Japanese citizen caught in Japan at the outbreak of the war and had to earn a living, and without the stigma of treason applied for a job at the only places that he was sure he might receive the same. There was no thought or intent of betrayal of the United States in that application nor in the assignment of the job that was given to him. Nor, has the

government contended in the trial, nor in its briefs, that employment in this job as an interpreter constituted treason.

The Government asserts that his job did not bring him within the purview of any of the provisions of Section 801 of Title 8 U. S. C. because it asserts his was not "an office, post or employment under the government of a foreign state or political subdivision thereof."

The company itself was drafted into the service of the Japanese Government by an order (Exhibits No. Y1, DM1, D2. Testimony of Sapiro Mori, R. 478, Stipulation, R484). Here, likewise, the proof is clear that as such drafted company, in the service of the government, it was a government corporation just the same as were the coal mines when the Government of the United States took them over and controlled them during the war on Executive Orders, and when Attorney General Biddle took charge of Montgomery Ward & Co., in Chicago. Both of these then became Government controlled. The companies were managed and controlled by Government employees although persons worked for them, and the employees were in the category of government employees. (*United States v. United Mine Workers of America,* 330 U. S. 258.)

Although the employment was with what had been a private corporation, its management and control by the government made it a government corporation within the meaning of this section and employment in

such corporation was necessarily within the confines and purviews of 801 (d) of Title 8 U. S. C. If it was merely a private corporation Kawakita was not guilty of treason in any event.

THERE WAS NO CREDIBLE EVIDENCE AS TO EACH OVERT ACT BY TWO WITNESSES TO THE SAME IDENTICAL OVERT ACT WHICH WAS CERTAIN AS TO TIME, PLACE OR CIRCUMSTANCES.

An overt act is a proper subject for the safeguard of the two-witness requirements under the Constitution.

Overt acts are not just any incidental actions which may happen to occur contemporaneous with the existence of the treasonable scheme or during its execution. They are those parts of the scheme which constitute action in its furtherance, either effecting or attempting the purpose to give aid and comfort to he enemy. The plot or scheme must contemplate a representation of a secret or some connivance, or some understanding with the government of the foreign power sought to be betrayed. It is governmental action and not individual action. These elements are entirely lacking in this case. Such overt acts could not consist merely in innocent acts which have no relation to the treasonable scheme or design, or even acts which might be unpleasant or constitute physical violence or bodily injury, or even acts which constitute what has been de-

fined as war crimes—these are not overt acts of treason. The overt act of treason, which requires two witnesses for proof of such overt act, is a substantial safeguard against conviction by perjured testimony. Wigmore cogently justifies the scheme by pointing out that:

> "The opportunity of detecting the falsity of the testimony, by sequestering the two witnesses and exposing their variances in detail, is wholly destroyed by permitting them to speak to different acts."
>
> (See Wigmore, Third Edition, Vol. 7, Section 2037-2038.)

Dr. Kuttner, discussing the conical view of the requirement of two-witnesses says:

> "There are really but two perjured witnesses in whose testimony, a prudent judge would not find flaws and contradictions. The case of *Susanna Dan* XIII, is always cited as a classical example."

It is therefore essential that the two-witness requirement be specific as to the same date, time, place and circumstances. This is wholly lacking in all of the testimony given as to the eight overt acts; nor do any of the eight overt acts tie in with an intention to betray an allegiance.

Kawakita believed, and had a right to believe, that he was a Japanese Citizen. The court so instructed the jury. And, as such, residing in Japan he had a right to believe that his duty of allegiance was wholly

to Japan, whose citizenship he undisputedly had. As such, his acts (even if proved by credible evidence) would not be of any intent to betray, as he did not have at that time any duty of allegiance to the United States.

In no other treason case do these similar elements appear. In the broadcasting case of Chandler, Best and Gillars, it was undisputed that the appellants had only the citizenship of the United States and there was no claim of dual citizenship in any of those cases. It was stipulated in each of those cases that the defendants had American citizenship. No claim was made to valid citizenship in another country.

The Tokyo Rose case has not yet been decided, by this court, but it is our understanding that she did not claim dual citizenship, but rather Portugese citizenship, and this is the first and only case which involves a citizen of another country, residing in that other country, and whose only claim to loyalty to the United States was that he was born in the United States at an earlier time.

It is stated in *United States v. Gillars,* 182 Fed. (2d) at page 980, that:

> "It is not disputed in this case that a citizen in an enemy country owes a temporary allegiance to the alien government, must obey its laws and may not plot or act against it."

But, a citizen of that country is not in enemy country for that is the country of his citizenship and he, there-

fore, owes a permanent and total allegiance to that government while living there and holding its citizenship.

HUNG JURY IN ITS UNANSWERED VERDICTS

The government has failed to meet our contention that the verdict was in effect a hung jury because the jury did not find on each of the overt acts one way or the other.

Under the case of *Andres v. United States,* 333 U. S. 740, 763, Mr. Justice Frankfurter pointed out:

> "Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict."

LACK OF SPEEDY TRIAL

There are several other points raised in our Opening Brief which have not been met or answered by the government:

The right to a speedy trial;

The right to be tried where one is found.

None of these matters have been met or answered by the government.

THE UNLAWFUL SEPARATION OF THE JURY

We have pointed out in our Opening Brief how the jurors were not only in different rooms, but on different floors with insufficient marshals to guard them during the period of their separation. Some of the jurors were taken apart from other jurors to barbers and other places. The law requiring sequestration of the jurors makes such separation unlawful. Prejudice must be presumed from the very violation of the mandate to keep the jury together and not allow them to be separated, whether on separate floors or otherwise during the period when they are out for their deliberation in a treason case. Los Angeles has ample jury facilities for keeping the jurors sequested under the observations of the Marshals. Other jurors are so kept.

THE COERCION IN CONNECTION WITH THE JURY'S DELIBERATION

The appellee has gone to great length to set up a chart on the jury's deliberation, and to set out according to its version "that it was only in deliberation 46 hours and 51 minutes." (Appellee's Brief, page 111.)

According to Appellee's chart, the jury went out to deliberate on Wednesday, August 25th, 1948, a hot August afternoon, and deliberated from 3:30 on in the afternoon until 9:30 that night, with various interrup-

tions. On Thursday morning they again deliberated all day, and Friday all day, and Saturday all day until 4:00 o'clock in the afternoon, when they came in with a request to be discharged.

THE COERCION OF THE JURY

Under the chart under which the Government attempts to justify the length of its jury deliberation, the jury had only deliberated 24-hours and 8 minutes in the jury room itself by Saturday August 28, 1948. The actual time, however, is that it had actually been in custody and confinement four days and nights or 96 hours. It is incomprehensible to believe that they did not discuss the case during the time they were thus confined together for deliberation, at times when not in the jury room itself. In fact these are often most vigorous times of persuasion.

The appellee in their desire to give a mathematical chart of the jury's deliberation have compressed the number of hours to 46 hours and 51 minutes. This calculation was erroneous, even under mathematical figures, as the hours were 49 hours and 6 minutes by mathematical calculation. But, by calculation the time that the jurors were actually together and discussing matters with each other, whether in the jury rooms or outside of the jury rooms, was actually 192 hours and 17 minutes. The jury was sent to the deliberating room on Wednesday, August 25, 1948 at 3:30 in the

afternoon, after being instructed in the morning and returned into court with their verdicts on Thursday, September 2nd, 1948 at 3:47 P. M.

Like most mathematical charts, it does not present a true and graphic picture of the blood, sweat and tears in which the jury engaged in this deliberation. It does not picture the hot and stuffy jury rooms where the jurors were sending for towels constantly—in an extraordinary summer temperature with no airconditioning and with the court telling them that they must continue to deliberate and without any statement as to when they might be discharged. It does not tell the picture of the foreman of the jury, who became so nervously exhausted that he could not see an electric light, that a physician had to be called for him, and that he wanted to fight with other jurors, and because of his illness (as pointed out by another member of the jury) he was relieved of his duties as foreman and another foreman was selected. This is not the picture of a calm and deliberate American jury. The hot torture chamber was too hot even for those believing in Kawakita's innocence, and who could not see treason in such acts as carrying two buckets of paint in place of one.

On August 28, 1948, the jurors were in bad condition and requested discharge. After being refused, they requested recess. The next day the foreman could not see electric lights in front of him. He was suffering from *nervous exhaustion*. The doctor had to be called.

What his physical and mental condition thereafter was is unknown. The defense had no opportunity to learn or challenge that condition. It may be fairly inferred that he was in such bad condition that he could not even act as foreman of the jury and a new foreman had to be selected. No other justifiable explanation exists in the record, since the law and procedure only permits a foreman to be selected—not two. The foreman having been selected, no authority was received or requested from the court nor were counsel advised that another election was to be had of another foreman.

However, we do know that a doctor found Mr. Andrews, the foreman, by August 29, 1948, in such bad neurological and nervous condition that he had to be adminisistered medicine, and the doctor testified that he was suffering from "nervous exhaustion." Actually, the jury thereafter probably consisted of only eleven competent jurors. There was no showing that the foreman was thereafter over his nervous exhaustion or competent to act.

On at least two other occasions doctors had to be called, all without the knowledge of the defense. This was not fair and calm deliberation permitted by the statute.

The *Haupt* case actually involved only a little more than a single period of deliberation totalling 24 hours. It was not shown in that case that any of the jurors became ill, or unable to deliberate or act; nor that a

doctor had to be called on three occasions to minister to the different jurors.

No case has been cited by the government where the jury has remained out the length of time of the present jury, nor under the circumstances herein cited. In no case has the jury asked to be discharged twice, after stating that it had considered every phase and feature of the case.

Juror Sidel stated that he was willing to go ahead as long as his energies hold out (R. 5624) and it appeared that Juror Clancy was suffering from heart trouble. Juror Nagumo immediately after the jury was discharged had a nervous collapse. The court had been informed—but not counsel—that jury foreman Andrews, who twice requested that the jury be discharged, was suffering from nervous exhaustion. Juror Florence Babb also became ill in the jury room and threw up. (R. Tr. 5774.)

Nowhere do we find in any of the cases cited by the appellee or elsewhere where such an amazing condition existed in the jury rooms.

Furthermore, the deliberations were in a hot and stuffy jury room, without any air conditioning. It was in the heat of the summer. The weather report of the temperature was introduced in evidence as Appellant's Exhibit A on Motion for New Trial. The jurors were constantly in a state of "turkish bath" having used innumerable towels during the deliberation. They

might as well have been in a torture chamber. They never knew when they would be released.

In the case of *Allis v. United States,* 73 Fed. 165, the jury was told, at least, that they would be discharged within a week if they did not agree. After the jury was out already eight days, with no knowledge as to when they might be released from their imprisonment as jurors and the torture chamber constituting the deliberating room, to require further deliberation constituted coercion on the part of the court.

The charge in the *Allen* case, so often referred, involves a murder case which had been tried three times. It had been reversed on two prior occasions and the charge given to the jury in its third trial was not even briefed before the court. The Supreme Court mentioned the fact that the plaintiff, in error, did not file any brief and it does not appear in that case just how long the jury had been deliberating; whether it was more than a portion of a day. In any event, the path which is set was followed by other courts but in entirely different settings. In none of them, however, is there a picture of a jury out 8 days in ungodly hot weather without any knowledge of when it might be discharged.

In the *Allis* case in the District Court, which first had the instruction which came up in the *Allen* case, the court told the jury he was willing to remain there another week. In that case he also told the jury how long, at the most, they might be held to deliberate; but

in this case the jury did not know that they would ever be discharged, for upon the urgent pleadings of the foreman, who was sick and regarding whose physical condition the court was well aware, the court nevertheless sent the jury back for further deliberation.

It was within the knowledge of all the jurors that the foreman of the jury had been sick and under a doctor's care and that another juror had been ill, and it was within the knowledge of the jurors that he was in no physical condition to continue. Yet, in spite of this fact, the trial judge told them to go out and deliberate further.

The effect of such facts before the jury, although unknown to counsel, had even a greater coercive effect on the jury than otherwise for they knew that the judge in sending the jury back to deliberate after its foreman had been so critically ill as to require a physician meant that the judge was determined that the jurors should return a verdict in spite of anything else that might exist.

In no case do we find where the jurors have been given such an instruction where there were facts before the jury that one of its members was ill and unable to continue deliberations for reasons of nervous exhaustion and yet compelled to continue. And, in no case do we find that such an instruction was given in that case with the full knowledge of the jurors. This was not a judicial whisper—it was a judicial command to go back and agree—sick or well. Nor do we find any-

thing before the court to indicate that it inquired as to the condition of the foreman, for whom it had required a physician to be called and to attend to him without the knowledge of counsel.

Had counsel been informed by the court of the illness of the juror, or that a physician had been called for him, or that he could not even see the electric light, and was suffering from nervous exhaustion, counsel would have been entitled to inquire regarding the juror's state of mind at the time he requested to be discharged and to inquire whether the juror was in that mental condition which enabled him to continue deliberations. If he was not in a mental condition to continue deliberation, the case was thereafter being tried by eleven competent jurors and was no longer a full jury of 12 competent persons; and in that state of physical condition (if counsel had been apprised and had been able to have had it established) he was entitled to have the jury discharged.

But the coercive effect on the rest of the jurors of having to be compelled to continue deliberation, with one of its jurors sick and others complaining of other physical ailments, was not the American way of fair jury trials.

It was also shown that Juror Clancy was having heart trouble and took some medicine during the time of the jury deliberations, and that Mrs. Otillie Younger had become ill, and that another woman had thrown up during the deliberations. Nevertheless, even after

illnesses, the jury were told to "march on," like soldiers on a battlefield.

On Saturday, August 28, 1948, the trial judge agreed with counsel's objection that no further instruction should be given to the jury that the *Bollenbach* case so indicated where a jury had been having a hot dispute any statement of the judge might tip the scale—and he simply sent them out for further deliberation. But, on Monday, August 30, 1948, he decided to give the instruction which he did not give on the 28th.

The jury then continued to deliberate until September 2, 1948, at the hour of 3:47, when they returned into court with the verdict as to the eight overt acts. Contrary to evidencing discrimination, the examination of the evidence in relation to the verdicts shows that they could not hold out the marathon any longer. "Eight days of confinement under these conditions was too much for any of them to tolerate, although they had previously expressed themselves as willing to hold out as long as their strength might permit it."

As stated in *People v. Sheldon,* 155 N. Y. 268, 53 N. E. 841, 41 L. R. A. 644, it is said:

> "A verdict based upon any other method than by the exercise of the full and free judgment of the individual jurors and the weighing of the evidence is invalid. It is regarded as coercive conduct for the court to threaten to keep the jury in long continued confinement."

and the court further held that:

> "The old rule permitting coercion of a jury in order to secure a verdict has been swept away, and under our present method the independence of a jury is respected."

The court, in that case, which was decided July 7, 1898, quoted from *People v. Olcott,* 2 John. Cas. 301, 1 Am. Dec. 178, where Mr. Justice Kent, in an opinion reviewing prior cases at length paid his respect to the rule formerly existing of compelling an agreement of the jury said:

> " 'The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded, not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, but does not . . . stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction, obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day'."

It is the duty of the court to discharge the jury if they do not agree after all the views of the several jurors are expressed and presented in the different forms and individual opinions of the jurors are fully and conscientiously made up.

People v. Faber, 199 N. Y. 256, 92 N. E. 674.

In *United States v. Samuel Dunkel,* 173 Fed. (2d) 506, cited among the cases by Appellee's brief, page 127, the Second Circuit reversed the cause because after the jury had deliberated for only more than 12 hours over a 24-hour period in which it had several times requested and received further instructions and explanations of the law (173 Fed. (2d) 507), the jury foreman reported that they were unable to reach a satisfactory agreement, after many hours of due deliberation. The foreman reported that "There is a majority, very much in agreement." The court then gave the instruction in the case of *Allen v. United States,* 164 U. S. 492 at 501. The Second Circuit reversed on the grounds of coercion.

The court points out in that case:

> "But notions have changed since the days when the jurors were kept without 'meat, drink, fire, or candle' until they reached an agreement, and, if they were not agreed before the judge was due to move on the next assizes, were carried with him in a cart." *(citing People v. Sheldon,* 256 N. Y. 268, 275, 41 L. R. A. 644), giving a detailed treatment of the historical development of the jury, 173 Fed. (2d) 508).

In the present case the foreman of the jury started to speak about one juror, when the court cautioned him not to tell how the jury stood as to number, said that that juror was not alone. There was sufficient colloquoy in the court room to show that any further

deliberation by that jury, of necessity, would have to be a coercive verdict.

The Second Circuit quotes from *Brasfield v. United States,* 272 U. S. 448, at 450, which settled the law on the question of coercion of a jury. It ordered a reversal of the conviction because the trial judge had inquired how the jury was divided numerically. This coercive effect was far less than that indulged here, where the jury twice requested that it be discharged as it was unable to reach a verdict after having considered every phase of the case.

These were business people on the jury, who had as the court was informed, "other things to do." They were told that they had to go back and continue deliberating until they reached a verdict. The chart of their time schedule, under these circumstances, is fallacious and deceitful. As said in the *Brasfield* case, "Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate court and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, and improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned." (173 Fed. (2d) 510).

We challenge the right to give the charge as given in the *Allen* case in circumstances of the setting of this case. This Circuit has never authorized this charge, coupled as it was with a command that it was the duty of the jurors to agree. No case has been pointed out by the government where the jury had been kept out eight days, without any knowledge of when they might be discharged, unless they did agree.

"Reasonable doubt" had appeared and was adhered to after four days of deliberation. That such reasonable doubt disappeared after four more days of confinement tells the answer to the story. It was coercive.

Trial by a jury, as set out in the Seventh Amendment to the Constitution of the United States, means a *fair* trial by jury. Otherwise it is not a jury trial in its true sense. We challenge the Allen construction as unconstitutional and in violation of the Seventh Amendment to the Constitution of the United States, and in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States in giving to the accused a fair trial.

And, we again reiterate the circumstances described by the Supreme Court in *Bollenbach v. United States,* 326 U. S. 607, in which the court pointed out that under the tensions under which the jury was then situated the giving of the additional instruction was highly prejudicial in bringing about a verdict.

The failure of the jury quickly to reach a conclusion has been suggested as an indication of *a balance so delicate* that any error on the judge's part may turn the scales. (See *Nick v. United States,* 122 Fed. (2d) 660, 674, 138 A. L. R. 791; *United States v. Dunkel,* 173 Fed. (2d) 511).

THE ALLEN JURY INSTRUCTION CHALLENGED AS UNCONSTITUTIONAL

We challenge the instruction given by the Court in the *Allen* case as set out in the footnote in Appellee's brief, page 120. This instruction is out of date. It was given at a time when persons had to come from far distances by horse and buggy. Its constitutionality has never been raised, nor have the courts been asked to overrule it. It was first given in 1893 in *United States v. Allis,* 73 Fed. 165 and repeated in *Allen v. United States,* 164 U. S. 492, decided December 7, 1896. It belongs to the era of *People v. Sheldon,* 156 N. Y. 268, 275, which has been long outmoded. It belongs to the days when jurors had to be carried in a cart when the judge was due to move on to the next assizes, but those "horse and buggy days" are gone; so are the days when a jury may be kept without "meat, drink, fire or candle until it reached an agreement."

The Seventh Amendment to the Constitution of the United Statese requires a jury trial, which means a fair jury trial. And, the Fifth Amendment to the

Constitution guarantees trial with due process of law, as that amendment has been defined to mean—"a fair trial." The definition "a fair trial" has received much consideration by the Supreme Court of the United States since 1941.

The instruction given to the jury, under the circumstances of this case, deprived the accused of fair trial guaranteed by the Fifth Amendment and implicit in the Right of Trial by Jury under the Seventh Amendment.

The language of the instruction is false in its second sentence.

The statement that

> "Your failure to agree upon a verdict will necessitate another trial equally as expensive."

There is no reason to believe that the failure of the jury to agree upon a verdict would necessitate another trial. As a matter of fact, many cases are dismissed as a result of a disagreed jury. In the present day review of events, the Attorney General and the United States District Attorney frequently evaluate cases and determine whether they should be retried, and frequently end them without a trial by dismissal.

In the instant case, if the government upon re-examination of the facts in the case were to determine that the appellant was no longer an American citizen, he might well have been permitted to return to Japan and the prosecution dismissed.

The statement to the present jury that "it would necessitate another trial" was an incorrect statement of the facts under present day procedure, which might have existed at the time of the Allen case but does not exist today.

Nor is it any of the Jury's business to consider in reaching a verdict whether there will be another trial with other witnesses, or how much expense was involved in the trial. A factor which might compel a taxpayer to surrender conscientious views.

In the Allen case instruction quoted the court there said:

> "It is therefore very desirable that you should agree upon a verdict."

The court in the instant case paraphrased the language of the *Allen* case.

The language used by the trial court that *"it is your duty, members of the jury, to agree,"* etc., quoted in full in our Opening Brief, page 232, was not in either the *Allis* or the *Allen* case. As far as the judges went in those cases, at no time did they tell the jury that it was *their duty to agree,* which did violence to their individual judgment and conscience. It is only their duty to act conscientiously whether they reached a verdict or not.

Weathers v. United States, 316 U. S. 636, cited by appellee on page 134 of their brief, does not help. That case quoted a single sentence about the duty of agree-

ment without the other portion of the charge. As stated by the trial court in its charge in the instant case

> "I do not speak in any critical vein. We are dealing with an attempt to get 12 human beings to arrive at a common conclusion as to the truth."

In no case can we find where such a charge has ever been given to a jury which had twice expressed itself as having considered all of the evidence and was unable to agree as to the truth, and had twice earnestly requested to be discharged.

The giving of decorative expressions surrounding this statement cannot relieve the court of the erroneous charge. In *United States v. Dunkel,* 173 Fed. (2d) at page 510, the court said:

> "It seems, too, that sustenance cannot be drawn from the jury's long continued deliberations and apparent care in discriminating between the defendants when it finally rendered its verdict. The very failure of the jury quickly to reach a conclusion has been suggested as an indication of a balance so delicate that any error on the judge's part may turn the scale."

That the jury's returning a verdict was discriminating is shown by an examination of all of the evidence in the case; where treason, for instance, was found on one count where Armellino allegedly was ordered by defendant to carry two buckets of paint—where he had been carrying only one, although two buckets was the required number to carry, and where a person who was

injured was not permitted to be moved without proper medical attention or medical corps men and where he could have been taken to a mine hospital a short distance away, and the charge of treason was that he was not moved to the camp eight miles away until three hours later. These, as well as the other findings of the jury show such lack of consideration as to demonstrate that coercion and *coercion alone* brought in the verdict.

The jurors no doubt prayed long and hard for their own relief from confinement.

THE DUTY OF KEEPING THE JURY SEPARATE OR NOT SEPARATE, OR KEEPING IT IN PROPER PLACE OF QUARTERING WAS THE COURT'S FUNCTION, NOT COUNSEL'S.

We were not consulted as to where the jury was to be taken, or kept, or the manner of their keeping. At the last minute, and without our consent, a new Marshal was imported into the case to take them over—one who had handled many juries and who was a former lieutenant in the United States Navy. To require appellant to show prejudice would be to destroy the very doctrine of presumption that an unconstitutional or improper handling of the jury is in itself prejudicial.

REFUSAL TO POLL JURY

Appellee asserts there was no error in the court's refusal to poll the jury, as requested by the appellant.

Appellee misunderstands the nature of the request. The court, in this case, had submitted special instructions or interrogatories to the jury, which it had denominated "special verdicts" and these might be viewed as pursuant to Rule 49 Rules of Civil Procedure, which permit special verdicts and interrogatories.

This is the first case which involves "special verdicts or inquiries" to the Constitutional definition of treason, where, so far as we can find, there has been a request made to poll the jury to see if the constitutional requirement of two witnesses to the identical transaction have been established. We sought only thereby to determine whether the mandate of the Constitution had been complied with.

A special verdict has been used as an aid to the court and jury in a treason case. But, it is necessary to find out if all twelve jurors agreed as to the special verdict by the constitutional mandate of two witnesses; that is, the names of two witnesses. No such polling was permitted by the court, and we believe that it was error.

Furthermore, the failure to return an answer to each of the "special verdicts" resulted in a disagreement. No case holds, so far as we could find, that

where special verdicts were submitted to the jury as to the different overt acts, that the jury was not required to answer the special verdicts as to each of the overt acts or the overt acts must be withdrawn. Neither was done in this case, although the trial court gave the government a chance to withdraw the overt acts on which the jury made no finding after the jury returned, and when the appellant demanded that the jury be sent out for further deliberation to complete its verdict.

The failure to send them out and the failure to withdraw the overt acts, we respectfully submit resulted in a hung jury.

> See also *Walker v. New Mexico and S. P. R. Co.*, 165 U. S. 593, 41 L. ed. 837.

We think the accused is entitled to have the jury polled to determine the names of two witnesses who testified as to the two identical overt acts in the opinion of the jury. Otherwise four of the jurors might have believed that certain witnesses testified as to one overt act, four as to another and four as to still another, and there be no actual unanimity as to the two witnesses which the jurors each thought established the overt act in question.

> (See Wigmore, Third Edition, Section 2038, Vol. VII, page 271; *Cramer v. U. S.*, 325 U. S. 1; *Haupt v. U. S.*, 330 U. S. 631.)

LACK OF SPEEDY TRIAL

The appellant asserts and again re-asserts that his trial in the United States, being indicted more than two years after the alleged offense and after he had repeatedly reported to the Army in Japan and to the American Consul in Japan, deprived him of a fair and speedy trial guaranteed by the Constitution. Time and space dissipated both witnesses and evidence. Our complaint of lack of evidence was based upon both of these elements and compelling the case to trial in an atmosphere of war hysteria in a state which the then Attorney General of the United States said could not try a Japanese person fairly.

COMPLAINT REGARDING TRIAL COURT

Our complaint regarding the trial court was based principally upon our difference of legal opinion regarding fundamental rulings involving lack of proof of treason, dual citizenship, loss of nationality, speedy trial in Japan and other basic rulings which this court in its essence is required to pass upon, the lengthy and unwarranted deliberations of the jury and the final judgment imposed by the trial court in giving the appellant the death sentence in this case.

Appellee asserts that the trial court was not arbitrary in sentencing this appellant to the death sentence, and states in his position that the trial judge said:

> " . . . the only worth-while use for the life of a traitor, *such as this defendant has proved himself to be,* is to serve as an example for those of weak moral fibre who may hereafter be tempted to commit treason against the United States."

The appellant did not prove himself to be a traitor. On the contrary, he disproved himself to be a traitor. At no time did he admit any acts of treason against the United States. The undisputed proof showed him to be a Japanese citizen. As such he owed 100% loyalty to Japan. This excluded any possible treason. Has cross-examination of the Government witnesses also developed a complete lack of treason in any of the overt acts found by the jury? He proved his innocence, and did not prove himself to be a traitor. Hence, no comfort can come to the appellee for the arbitrary actions of the judge. A careful reading of the statement of the trial judge is:

> That he believes that the only worth-while use for the life of *any person convicted of being a traitor* is to serve as an example for those of weak moral fibre and to give them the death sentence.

This is not the exercise of discretion; it is arbitrary and capricious and is not warranted in the light of the law and the facts in this case.

Mattox v. U. S., 146 U. S. 140, 144, 36 L. Ed. 920;
Zeveig v. U. S., 60 F. Supp. 785.

We have covered the subject matter of INSTRUCTIONS in our Opening Brief. Basically, the trial court's error was in connection with the law relating to dual citizenship, as we frequently argued it in the trial of the case, and throughout our opening brief and as well as in offered instructions and as to the effect of treaties regarding aid and comfort.

It is our position that a correct instruction in view of the dual citizenship of the appellant was that if the appellant as a dual citizen honestly believed that he owed total allegiance to Japan he could not be guilty of treason.

As to the instructions given by the court, the trial court throughout ignored the issue of dual citizen. For instance, in Instruction 11-F the court stated (page 312 Clerk's Transcript):

> "In order then to be relieved of the duty of allegiance imposed by American citizenship, one must do some voluntary act of renunciation or abandonment of American nationality and allegiance. And it is the policy of our law to permit free exercise of the right of expatriation by all American citizens everywhere."

And, in Instruction 11-L (page 325 Clerk's Transcript) the court said, correctly, we believe, under its duty of dual citizenship that:

> "As stated before, the defendant was at liberty during his stay in Japan to renounce or abandon his American citizenship and with it all duty of

> allegiance to the United States. But unless and until he did so, the defendant owed allegiance under our law to his native country, the United States."

It ignores entirely his dual citizenship and his rights and duties as a dual citizen.

On the subject of dual citizenship, the defendant offered several instructions, pages 153 and 154 of the Clerk's Transcript. On page 154 of the Clerk's Transcript the defendant offered an instruction on the duty of a dual citizen to the country in which he resides and to which he owed paramount allegiance. And, he offered instructions 49 on page 157 of the Clerk's Transcript on his rights and duties as a dual citizen. Also on pages 158 and 159 of the Clerk's Transcript, which the court refused.

Nor did the government answer our objection to the court's failing to give the jury defendant's instruction number 80-A regarding the fact that the entry of the defendant's name in the Koseki Tohon, or family register, was under the law of Japan a formal declaration of allegiance to that country, and by causing his name to be entered into it after he was 21-years of age he elected to be a Japanese subject.

The appellant offered several instructions which the court refused on the legal situation as to the defendant being found in Japan, and as to the fact that after the Americans took over Camp Oeyama it was their duty to punish anyone for violation of the laws of the United

States, and particularly treason. (Clerk's Transcript, pages 189, 190.) And, as a matter of fact, if they did not punish the appellant for treason such persons were guilty of misprision of treason under the laws of the United States.

On page 182 of the Clerk's Transcript, the defendant offered Defendant's Instruction No. 82 regarding the resumption of appellant's citizenship of Japan as a dual citizen.

The court also refused defendant's proffered instruction 86-A regarding the status of war prisoners, that they were no more than a labor battalion who were subject to discipline for violation of the rules and regulations of the camp. The court erroneously refused this instruction, as follows:

"DEFENDANT'S INSTRUCTION NO. 86-A

You are instructed that while the Japanese Government did not sign the Treaty of the Hague, it nevertheless agreed through the Swiss Government to apply those principles *mutatis mutandis.* Under this agreement Japan could treat the prisoners of war as a labor battalion, and could discipline the men who failed to live up to the rules and regulations, or who violated its laws, in the same manner as it inflicted punishment upon its own men.

Therefore, if you find from the evidence that any of the men who were prisoners of war violated rules and regulations, or committed crimes

while prisoners of war, and that they were punished for it, and even if you find that the defendant aided or assisted in that punishment, you cannot find the defendant guilty of treason. If you have a reasonable doubt whether the defendant merely aided in carrying out punishment as a part of discipline required among prisoners of war, or whether he did those acts with treasonable intent to adhere and give aid and comfort to the enemy, you must acquit him."

The defendant's proffered instruction on page 205 of the Clerk's Transcript that if he did the things in an individual capacity he could not be guilty of treason was an instruction similar to one given in the *Cramer* case. The defendant was entitled to have it given.

We offered an instruction on the right and the power of American Military Tribunals to try the appellant for treason, and that a prisoner of war camp taken over by the United States is a district or place where one may be found. (Clerk's Tr., 228, 229, 230, 231, 232.)

THE 2-WITNESS RULE. THE COURT ERRED IN REFUSING TO POLL THE JURY

When the jury returned into court, we asked that the jury be polled as to the names of the two witnesses which the jury thought established each overt act found by them. This request was denied by the court. We think it was vital.

The statement by the government as to the number of witnesses to each overt act (Appellee's Brief, page 109) proves nothing as it does not establish which one of the witnesses the jury believed established each overt act.

We think we were entitled to have the jury polled on this question.

> See Wigmore, Third Edition, Vol. VII, Section 2038, pg. 271.

"Treason" is the gravest of all crimes. By its nature it can only be charged or suspicioned in time of high tension, when heightened public passion tends to raise many unpopular beliefs or desires or animosities to the stature of unpatriotic conduct and enlarge the danger of unjust or unfounded accusations of disloyalty or constructive crimes of treason. Our constitution protects as much in time of war or civil dissention as in time of peace and quiet against such constructive treason and unfounded accusations, and in recognition of these guarantees our Supreme Court under the Constitution has done great service in avert-

ing the abuses of treason charges as instruments of oppression.

Cramer v. United States, 325 U. S. 1.

That court has insisted upon careful definitions of the offense; has directed requirements of proof to the end that treason shall comprise only conduct directly aimed at the foundations of government—levying of war or directed to the securing of success of its external enemies through devious means or outward manifestations of intent to deliver our government into the hand of the organized enemies, while that person is only a citizen of the United States, and owes allegiance to it, by adhering to the enemies and giving aid and comfort as an organized government.

The appellee has urged upon this court an expansive construction of the constitutional definition, and a narrowing of its procedural safeguards.

This case arose when an ex-G I, a former prisoner of war of Camp Oeyama, saw the defendant in a Sears-Roebuck Store in Los Angeles, California. All of his animus of those years of suffering in Battan and the Philippines, and later in Camp Oeyama, while he was a prisoner of war under International Law directed by governmental authority, flashed through his mind and he was "ready to kill the defendant" against whom his sole complaint was "that he had not permitted the former prisoner of war to smoke in an area where smoking was prohibited, and did not permit him to complete eating some nuts."

That fury translated itself into an investigation by the FBI. After more than nine months of investigation the charge of treason was lodged in the United States. The mountain of labor produced a mouse of results.

The first indictment charged eleven overt acts. A superseding indictment amplified it to fifteen. These covered a period of a year. All of the acts concerned conduct within the prisoner of war camp where these men were confined within the power, under International Law, of Japan, and Kawakita too was within the power of Japan.

Immediately after America won the war, however, Kawakita was then within the power of the United States. If he was such a traitor as charged, then short-shrift could have been made of him by the Military forces of Japan. He was subject, under International Law and Military Law, to immediate court-martial by the Armies of the United States, which had taken over; and he was subject later to trial before the Military Commander established the following January in Japan and at all times subsequent thereto. No search was made for him. He knocked at the doors of the American Consulate repeatedly, and at the door of the Army of Occupation. No charges were lodged against him.

His opportunity to defend, had such charges then been lodged against him, would have been far greater than at the time he was brought to trial in the United

States, not only by the fact that witnesses and documents were then available to disprove the charges made, which later disappeared and were unavailable, but he could have shown by innumerable witnesses in Japan that at the times when it was claimed that he was "aiding the military in inflicting punishment" for theft, cutting up government blankets and other matters, he was actually working in the electrical shop as a clerk, which work ended at five o'clock in the afternoon, but many Japanese witnesses whose names or whereabouts were unavailable at the time of trial would have been available to him under his right to a speedy trial.

These issues have not been met by the government at all, nor has it denied—as it could not—that this so-called traitor was used by Major Martin, who was in command of the Camp Oeyama after the Americans took over, to take the boys out sightseeing to various places near Camp Oeyama and for various entertainment in which they indulged, and even for the setting up of prophylactic stations to preserve their health. It was Kawakita who arranged for transportation away from the camp, and he was the last one at the camp to wave farewell to them. And, it is incomprehensive to believe that any of these occurrences would have taken place if Kawakita was a traitor, or that any of the men at this farewell scene thought he was a traitor. If so, he would have been locked up immediately and punished. But, instead of that Kawakita believed that he still was a Japanese with no other rights

than his duties to Japan. He remained in Japan and went to work in Japan. Had he thought he was an American he might even have asked these men if he could return to the United States with them.

It is significant that it was not for several months afterward when Kawakita inquired from the American Consulate what he could do to regain his American citizenship that he was told by the American Consulate that he had dual citizenship, and it was on the action of the American Consulate and the preparation of a document by the Clerk in the American Consulate office that he applied for transportation to return to the United States on the explanation of the dual nationality—and on which the government in this case largely relied.

The government brought Meiji Fugasawa to the United States as one of its witnesses. He was the other interpreter who was working in the camp and was actually the Camp Interpreter during the time of this trial. During the time of trial, he was an employee of the United States Government in Japan.

Although he gave testimony against Kawakita in the trial, and aided and assisted the government wherever he could, he admitted on examination by the appellant that he at no time had ever heard while in Japan that Kawakita had ever struck, beaten, or otherwise hit any of the persons named in the indictment; nor had he ever seen Kawakita at any time assist the

military authorities in inflicting any punishment, although he did see punishment inflicted by the military personnel. He also testified that he himself was in great fear of the military Sergeant Ichiba and Akamatsu. That he was at all times interpreter in the camp itself, and from March until the end of the war, the only times he saw Kawakita in the camp was when the Camp Commandant called Kawakita to assist him in interpreting letters or messages of prisoners of war.

Although the appellant put on Dr. Lemoyne Bleich, the only medical officer of the United States who was a prisoner of war and who was delegated by the Japanese government to examine each prisoner of war daily as to his fitness to work, and whose recommendations as to their fitness was taken by the Japanese Commandant, literally speaking, nevertheless Captain Bleich did not ever testify to seeing or hearing of Kawakita ever mistreating any prisoner of war. Dr. Bleich witnessed the so-called punishment of J. C. Grant and tried to get him out of the pool, but he did not observe Kawakita around. It is incomprehensible that if any prisoners of war had been beaten or struck and in any wise seriously injured the fact would not have been reported to Dr. Bleich or that they would permit a treasonable Jap to show them the pleasure resorts of Japan and act as their favored or chosen interpreter among three available. We think Tomoya Kawakita is the unfortunate victim of the aftermath of war psychosis, that he is completely innocent and that he should be completely exonerated.

We pray for reversal of the judgment and an order directing the court below to enter judgment of acquittal, or dismiss the indictment.

Respectfully submitted,

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